Supreme Court, U.S.
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No. 98-822

IN THE

Supreme Court of The United States

FRIENDS OF THE EARTH, *et al.*,
Petitioners,

vs.

LAIDLAW ENVIRONMENTAL SERVICES (TOC), INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

JOINT APPENDIX

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[RELEVANT DOCKET ENTRIES FROM]

U. S. District Court
District of South Carolina (Columbia)

CIVIL DOCKET FOR CASE #: 92-CV-1697

Friends of the Earth, et al v. Laidlaw Environ
Filed: 06/12/92
Assigned to: Judge Joseph F. Anderson, Jr. Jury demand: Plaintiff
Demand: $0,000 Nature of Suit: 893
Lead Docket: None Jurisdiction: Federal Question
Dkt# in other court: None

Cause: 33:1365 Environmental Matters

6/12/92	1	COMPLAINT; FILING FEE $ 120. 00 RECEIPT # 63831 Scheduling order due by 9/14/92 Service due by 7/12/92 for Laidlaw Environ (swil) [Entry date 06/16/92]
7/1/92	4	MOTION by defendant Laidlaw Environ to dismiss (swil) [Entry date 07/07/92]
7/1/92	5	MEMORANDUM by defendant Laidlaw Environ in support of [4-1] motion to dismiss (swil) [Entry date 07/07/92]
7/13/92	--	Motion hearing re: [4-1] motion to dismiss at 10:00 7/23/92 (swil)
7/24/92	8	AMENDED COMPLAINT by plaintiff Friends of the Earth, plaintiff CLEAN, Inc. , (Answer due 8/3/92 for Laidlaw Environ) amending

[1-1] complaint adding plaintiff Sierra Club (swil)

8/4/92 9 MOTION by defendant Laidlaw Environ to dismiss, and to strike [8-1] amended complaint (swil)

8/4/92 10 MEMORANDUM by defendant Laidlaw Environ in support of [9-1] motion to dismiss, [9-2] motion to strike [8-1] amended complaint (swil)

8/7/92 11 MOTION by defendant Laidlaw Environ to dismiss, and to strike [8-1] amended complaint (swil) [Entry date 08/10/92]

10/6/92 20 MOTION by plaintiff Friends of the Earth, plaintiff CLEAN, Inc. , plaintiff Sierra Club for preliminary injunction (swil)

10/6/92 21 BRIEF by plaintiff Friends of the Earth, plaintiff CLEAN, Inc. , plaintiff Sierra Club in support of motion for preliminary injunction. (swil)

10/23/92 26 SUPPLEMENTAL MEMORANDUM by defendant Laidlaw Environ in support of [11-1] motion to dismiss, [11-2] motion to strike [8-1] amended complaint (jhal) [Entry date 11/02/92]

10/26/92 27 Brief by plaintiff Friends of the Earth, plaintiff CLEAN, Inc. , plaintiff Sierra Club in opposition to [11-1] motion to dismiss, [11-2] motion to strike [8-1] amended complaint (jhal)

[Entry date 11/02/92]

10/30/92 28 REPLY by defendant Laidlaw Environ to [27-1] opposition memorandum (jhal) [Entry date 11/09/92]

11/3/92 31 MEMORANDUM by defendant Laidlaw Environ in opposition to [20-1] motion for preliminary injunction (jhal) [Entry date 11/09/92]

11/16/92 32 REPLY BRIEF by plaintiff Friends of the Earth, plaintiff CLEAN, Inc. , plaintiff Sierra Club in support of [20-1] motion for preliminary injunction (jhal) [Entry date 11/17/92]

11/19/92 -- Motion hearing re: [20-1] motion for preliminary injunction, [11-1] motion to dismiss, [11-2] motion to strike [8-1] amended complaint. (JFA,jr/gs). Motion for Prel. Inj, cont'd until 11/20/92. Deft's motion to dismiss, denied. Deft's motion to strike, denied. (jhal)

11/20/92 -- Motion hearing re: [20-1] motion for preliminary injunction. (JFA,jr/gs). Court hears argument and takes under advisement. Written Order to be entered. (bwil)

12/3/92 35 SUPPLEMENTAL MEMORANDUM by plaintiff Friends of the Earth, plaintiff CLEAN, Inc. , plaintiff Sierra Club in support of [20-1]

motion for preliminary injunction (jhal)[Entry date 12/16/92]

12/14/92 37 ORDER denying [20-1] motion for preliminary injunction, denying [11-1] motion to dismiss, denying [11-2] motion to strike [8-1] amended complaint, denying [9-1] motion to dismiss, denying [9-2] motion to strike [8-1] amended complaint and granting plaintiffs' motion made orally at the hearing on 11/19 to add Sierra Club as a co-plaintiff (signed by Judge Joseph F. Anderson Jr.) (jhal) [Entry date 12/16/92]

2/26/93 43 MOTION by defendant Laidlaw Environ for summary judgment as to plaintiff Friends of the Earth (jhal) [Entry date 03/01/93]

2/26/93 44 MEMORANDUM by defendant Laidlaw Environ in support of [43-1] motion for summary judgment as to plaintiff Friends of the Earth (jhal) [Entry date 03/01/93]

3/11/93 47 AMENDED MEMORANDUM by defendant Laidlaw Environ in support of [43-1] motion for summary judgment as to plaintiff Friends of the Earth substituting memorandum in support filed 2/26/93 (jhal) [Entry date 03/24/93]

4/2/93 52 RESPONSE in opposition by plaintiff Friends of the Earth to defendant's [43-1] motion for summary judgment as to plaintiff Friends of the Earth (jhal) [Entry date 04/10/93]

4/12/93 54 AMENDED COMPLAINT by plaintiff Friends of the Earth, plaintiff CLEAN, Inc. , plaintiff Sierra Club , (Answer due 4/22/93 for Laidlaw Environ) Service due by 5/12/93 for Laidlaw Environ amending [8-1] amended complaint; (jhal) [Entry date 04/13/93]

4/12/93 55 REPLY MEMORANDUM by plaintiff Friends of the Earth, plaintiff CLEAN, Inc. , plaintiff Sierra Club in support of [50-1] cross motion to compel defendant to designate witnesses pursuant to plaintiff's deposition notice, for sanctions (jhal) [Entry date 04/13/93]

4/12/93 54 MOTION/Request by plaintiff Friends of the Earth, plaintiff CLEAN, Inc. , plaintiff Sierra Club for injunctive relief incorporated into amended complaint filed 4/12/93, doc #54 (jhal) [Entry date 04/13/93]

4/16/93 57 REPLY by defendant Laidlaw Environ to response to [43-1] motion for summary judgment as to plaintiff Friends of the Earth (jhal) [Entry date 04/26/93]

4/23/93 58 MOTION by defendant Laidlaw Environ to dismiss or in the alternative, to strike plaintiffs' newest amended complaint (jhal) [Entry date 04/30/93]

4/23/93 59 MEMORANDUM by defendant Laidlaw Environ in support of [58-1] motion to dismiss or in the alternative, to strike plaintiffs' newest amended complaint (jhal) [Entry date 04/30/93]

5/14/93 61 RESPONSE by plaintiff Friends of the Earth, plaintiff Sierra Club in opposition to [58-1] motion to dismiss or in the alternative, to strike plaintiffs' newest amended complaint. (ghay) [Entry date 05/24/93]

6/29/93 71 SUPPLEMENTAL MEMORANDUM by plaintiffs Friends of the Earth, CLEAN, Inc. , Sierra Club in opposition to [43-1] motion for summary judgment as to plaintiff Friends of the Earth. Exhibits to Supplemental Memorandum attached as Volumes I and II. (ghay)

6/30/93 -- Motion hearing re: [43-1] motion for summary judgment as to plaintiff Friends of the Earth Motion hearing held (JFA,JR/Jack Clarke). Motion for Summary Judgment denied. (bwil)

6/30/93 -- Minute entry: denying [43-1] motion for summary judgment as to plaintiff Friends of the Earth (bwil)

7/9/93 77 SUPPLEMENTAL MEMORANDUM by defendant Laidlaw Environmental in support of [58-1] motion to dismiss or in the alternative, to strike plaintiffs' newest amended complaint. (ghay) [Entry date 07/13/93]

10/26/93 -- Bench trial held before Judge Joseph F. Anderson Jr. / Gary Smith: as to the issue of the factual dispute on delingent prosecution: Court grants defendant's Oral Motion for Protective Order and plaintiff to provide the appropriate witness fee for subpoenaes issued to

defendant. Opening statements: Witnesses/Exhibits. (ydav) [Entry date 10/27/93]

10/27/93 -- Bench trial continues before Judge Joseph F. Anderson Jr. /gary smith. Witnesses/Exhibits. Plaintiff's oral motion for judgment as a matter of law as to issue of factual dispute on diligent prosecution - Denied. (nhar)

10/28/93 -- Bench trial continued before Judge Joseph F. Anderson Jr. /Gary Smith: Witnesses/Exhibits. Defendant's Oral Motion for judgment as a matter of law--Denied. (ydav) [Entry date 10/29/93]

10/29/93 -- Bench trial continued before Judge Joseph F. Anderson Jr. /Gary Smith: Witnesses. Trial continued to November 29, 1993. (ydav) [Entry date 11/01/93]

11/9/93 86 Transcript of Gary Smith of non-jury trial before Honorable Joseph F. Andrson, Jr. , in Columbia on 10/26/93 (Volume I). (bwil)

11/23/93 87 Transcript (Volume III) filed by Gary N. Smith of proceedings on 10/28/93 in Columbia - Non-Jury Trial. (bwil)

11/23/93 88 Transcript (Volume IV) filed by Gary Smith of proceedings on 10/29/93 in Columbia - Non-Jury Trial. (bwil)

11/29/93 91 MOTION by plaintiff Friends of the Earth, plaintiff CLEAN, Inc. , plaintiff Sierra Club to amend [54-1] amended complaint (nhar)

11/29/93 92 MEMORANDUM by plaintiff Friends of the Earth, plaintiff CLEAN, Inc. , plaintiff Sierra Club in support of [91-1] motion to amend [54-1] amended complaint with proposed Third Amended Complaint attached as Exhibit 1. (nhar)

11/29/93 -- Bench trial held before Judge Joseph F. Anderson Jr. /gary smith and jack clarke - continues. Defendant's witnesses (nhar)

11/30/93 93 Transcript (Volume V) of proceedings held 11/29/93 in Columbia before Judge Anderson (Non-Jury trial). (ghay)

11/30/93 -- Bench trial continued before Judge Joseph F. Anderson Jr. /Gary Smith and Jack Clarke. WITNESSES/EXHIBITS. Certain portions of testimony sealed. (bwil) [Entry date 12/02/93]

12/1/93 -- Bench trial completed before Judge Joseph F. Anderson Jr. /Gary Smith and Jack Clarke. WITNESSES/EXHIBITS. Certain portions of testimony sealed. Clerk requests counsel for plaintiff to file depositions which were used for impeachment purposes at trial. Counsel will file after trial with updated exhibit list for the record. Court takes under advisement and directs counsel to submit proposed Findings of Fact and Conclusions of Law (to be

mailed on or before January 3. 1994 - 75-page limit. Court will hear oral arguments after submissions. (bwil) [Entry date 12/02/93]

12/1/93 94 Transcript (Volume II) of proceedings held 10/27/93 in Columbia before Honorable Joseph F. Anderson, Jr. - Non-Jury Trial. (bwil) [Entry date 12/02/93]

12/1/93 95 Transcript (Volume VI) of proceedings on 11/30/93 in Columbia before Honorable Joseph F. Anderson, Jr. - Non-Jury trial. (Excluding Sealed Portions). (bwil) [Entry date 12/02/93]

12/1/93 96 Transcript (SEALED) - VOLUME VI - proceedings on 11/30/93 in Columbia before Honorable Joseph F. Anderson, Jr. - Non-Jury trial. (bwil) [Entry date 12/02/93]

12/1/93 97 Transcript (SEALED) - Volume VII - proceedings held 12/1/93 in Columbia before Honorable Joseph F. Anderson, Jr. - Non-Jury trial. (bwil) [Entry date 12/02/93]

12/15/93 100 RESPONSE by defendant Laidlaw Environmental in opposition to [91-1] motion to amend [54-1] amended complaint. (ghay) [Entry date 12/16/93]

1/19/94 102 REPLY by plaintiffs Friends of the Earth, CLEAN, Inc. to defendant's [100-1] opposition response to plaintiffs' motion to file 3rd amended complaint. (ghay)

1/24/94	--	Bench trial held before Judge Joseph F. Anderson Jr. /Gary Smith. Oral arguments on the mertis. Court takes under advisement and will issue written order. Plaintiff's motion to amend complaint, under advisement. (bwil)
1/24/94	--	Minute entry: [91-1] motion to amend [54-1] amended complaint taken under advisement (bwil)
2/10/94	--	Motion hearing re: [103-1] motion to hold open the record until 3/4/94. Court grants motion to hold open record until 3/4/94 and further directs parties to submit proposed questions which shall be submitted to EPA in the event court decides to ask EPA to submit amicus brief. Proposed questions to be submitted within ten days. (bwil)
2/10/94	--	Minute entry: granting [103-1] motion to hold open the record until 3/4/94. (bwil)
2/10/94	105	SUPPLEMENTAL MEMORANDUM by defendant Laidlaw Environ in support of [58-1] motion to dismiss or in the alternative, to strike plaintiffs' newest amended complaint. (ghay) [Entry date 02/11/94] [Edit date 02/11/94]
3/28/94	106	ORDER mooting [62-1] motion for leave to file Supplemental Memorandum in Support of its Motion for Summary Judgment as to Plaintiff Friends of the Earth; mooting [58-1] motion to dismiss or in the alternative, to strike plaintiffs' newest amended complaint; mooting [54-1]

		motion for injunctive relief. (signed by Judge Joseph F. Anderson Jr.) eod mld 3/28/94. (ghay)
3/29/94	107	ORDER requesting EPA file amicus curiae brief in this action. Copy of letter to Department of Justice requesting brief attached to this order. (signed by Judge Joseph F. Anderson Jr.) eod mld 3/29/94. (ghay)
4/22/94	108	MEMORANDUM by plaintiff Friends of the Earth, plaintiff CLEAN, Inc. , plaintiff Sierra Club in opposition to defendant's motion to dismiss. (bwil) [Entry date 04/25/94]
5/31/94	109	BRIEF by United States of America as Amicus Curiae. (ghay)
6/6/94	110	ORDER: Defendant's reply brief due for 6/27/94 to Government's amicus curiae brief. Plaintiff's shall file their reply memorandum within 30 days of defendant's response. (signed by Judge Joseph F. Anderson Jr.) eod mld 6/7/94. (ghay) [Entry date 06/07/94]
7/7/94	111	SECOND SUPPLEMENTAL MEMORANDUM by plaintiffs Friends of the Earth in opposition to defendant's [58-1] motion to dismiss. (ghay) [Entry date 07/09/94]
7/8/94	112	REPLY by defendant Laidlaw Environmental to [109-1] brief amicus curiae of U.S.A. (ghay) [Entry date 07/18/94]

7/22/94 114 REPLY by U.S. as amicus curiae to defendant Laidlaw's response [112-1] to the U. S. 's brief. (ghay) [Entry date 07/25/94]

7/25/94 115 REPLY by defendant Laidlaw Environ to plaintiffs' [111-1] second supplemental opposition memorandum to defendant's motion to dismiss. (ghay) [Entry date 07/27/94]

8/8/94 116 ORDER Plaintiff's Reply to Response to Motion to dismiss to be filed by 8/15/94. (signed by Judge Joseph F. Anderson Jr.) eod mld 8/9/94. (ghay) [Entry date 08/09/94]

8/15/94 117 REPLY by plaintiff Friends of the Earth, plaintiff CLEAN, Inc. in response to defendant's submission regarding defendant's mercury limitation re: [111-1] opposition memorandum. (ghay)

8/18/94 118 REPLY MEMORANDUM by plaintiff Friends of the Earth, plaintiff CLEAN, Inc. to submissions of EPA and Defendant regarding economic benefit. (ghay) [Entry date 08/19/94]

8/24/94 119 SUPPLEMENTAL REPLY by defendant Laidlaw Environmental to [109-1] brief of U. S. as amicus curaie. (ghay) [Entry date 08/25/94]

9/19/94 120 REPLY by plaintiff Friends of the Earth, plaintiff CLEAN, Inc. , plaintiff Sierra Club to defendant's [119-1] reply to DOJ amicus brief

and response to plaintiff's reply brief. (ghay)

9/30/94 121 RESPONSE by defendant Laidlaw Environ in opposition to plaintiffs' brief regarding the ICI Americas decision. (ghay) [Entry date 10/04/94]

10/21/94 122 THIRD SUPPLEMENTAL MEMORANDUM by plaintiffs Friends of the Earth, CLEAN, Inc., and Sierra Club in opposition to defendant's [58-1] motion to dismiss or in the alternative, to strike plaintiffs' newest amended complaint. (ghay)

11/3/94 123 SUPPLEMENTAL MEMORANDUM by defendant Laidlaw Environ in support of its [59-1] support memorandum, re: its [58-1] motion to dismiss or in the alternative, to strike plaintiffs' newest amended complaint. (ghay) [Entry date 11/07/94]

11/4/94 124 REPLY by defendant Laidlaw Environ to plaintiff's third supplemental [122-1] opposition memorandum re: defendant's motion to dismiss. (ghay) [Entry date 11/07/94]

11/14/94 126 REPLY MEMORANDUM by plaintiff Friends of the Earth, plaintiff CLEAN, Inc. to defendants' supplemental [123-1] support memorandum re: defendants' motion to dismiss. (ghay) [Entry date 11/17/94]

12/5/94 128 MEMORANDUM by plaintiff Friends of the Earth, plaintiff CLEAN, Inc. regarding res

judicata and collusion. (ghay)

12/5/94 129 RESPONSE by defendant Laidlaw Environ in opposition to [125-1] Court's Letter dated 11/9/94. (ghay) [Entry date 12/06/94]

12/12/94 130 MEMORANDUM by amicus SCDHEC responding to issues raised in the court's letter of 11/9/94. (ghay) [Entry date 12/15/94]

3/21/95 131 NOTICE of Subsequent Precedent by plaintiff CLEAN, Inc. , plaintiff Friends of the Earth. Re: Public Interest Research Group of NJ v. Magnesium Elektron, Inc. (ghay)

3/23/95 132 REPLY by defendant Laidlaw Environ to plaintiffs'[131-1] notice of subsequent precedent. (ghay) [Entry date 03/28/95]

4/7/95 133 FINDINGS OF FACT AND CONCLUSIONS OF LAW. Plaintiffs' citizen suit allowed to proceed beyond the threshold limitation of section 505(b)(1)(B). This order does not address the merits of the plaintiffs' action. A separate scheduling order will be entered for substantive motions and a trial date for the remaining issues in the case. (signed by Judge Joseph F. Anderson Jr.) eod mld 4/7/95. (ghay)

4/14/95 135 ORDER granting plaintiffs' [91-1] motion to amend [54-1]. amended complaint, mooting defendant's [58-1] motion to dismiss or in the alternative, to strike plaintiffs' second amended

complaint. (signed by Judge Joseph F. Anderson Jr. eod mld 4/17/95. (ghay) [Entry date 04/17/95]

5/23/95 139 MOTION by plaintiff Sierra Club, plaintiff CLEAN, Inc. , plaintiff Friends of the Earth for partial summary judgment in favor of plaintiffs. (ghay) [Entry date 05/24/95]

5/23/95 140 MEMORANDUM by plaintiff Sierra Club, plaintiff CLEAN, Inc. , plaintiff Friends of the Earth in support of [139-1] motion for partial summary judgment in favor of plaintiffs. (ghay) [Entry date 05/24/95]

5/30/95 141 MOTION by SC State Chamber of Commerce and SC Textile Manufacturers Assn. for Julianne Farnsworth, Esq. to file amicus brief. Proposed amicus brief attached to motion. (ghay) [Entry date 05/31/95]

5/30/95 143 MOTION by defendant Laidlaw Environ for partial summary judgment in favor of defendant Laidlaw. (jhal) [Entry date 06/01/95]

5/30/95 144 MEMORANDUM by defendant Laidlaw Environ in support of [143-1] motion for partial summary judgment in favor of defendant Laidlaw. (jhal) [Entry date 06/01/95]

5/30/95 145 MOTION by defendant Laidlaw Environ for reconsideration of [133-1] findings of fact order of 4/7/95 or alternatively for certification to the Fourth Circuit. (jhal) [Entry date 06/01/95]

5/30/95 146 MEMORANDUM by defendant Laidlaw Environ in support of [145-1] motion for reconsideration of [133-1] findings of fact order of 4/7/95 or alternatively for certification to the Fourth Circuit. (jhal) [Entry date 06/01/95]

6/5/95 147 MOTION by plaintiff Sierra Club, plaintiff CLEAN, Inc. , plaintiff Friends of the Earth for expedited discovery and postponement of oral argument on the cross motions for partial summary judgment (ghay) [Entry date 06/06/95]

6/5/95 148 MEMORANDUM by plaintiff Sierra Club, plaintiff CLEAN, Inc. , plaintiff Friends of the Earth in support of [147-1] motion for expedited discovery and postponement of oral argument the cross motions for partial summary judgment (ghay) [Entry date 06/06/95]

6/5/95 155 BRIEF by amicus SC Chamber Commerce, amicus SC Textile Mfrs. (ghay) [Entry date 06/19/95]

6/7/95 151 RESPONSE by defendant Laidlaw Environ in opposition to [139-1] motion for partial summary judgment in favor of plaintiffs. (bwil) [Entry date 06/09/95]

6/9/95 154 MEMORANDUM by defendant Laidlaw Environ in opposition to [147-1] motion for expedited discovery and postponement of oral argument on the cross motions for partial summary judgment (ghay) [Entry date

06/13/95]

6/12/95 153 BRIEF by amicus SC Industrial Waste. (ghay) [Entry date 06/13/95]

6/19/95 157 MEMORANDUM by plaintiff Sierra Club, plaintiff CLEAN, Inc. , plaintiff Friends of the Earth in opposition to [145-1] motion for reconsideration of [133-1] findings of fact order of 4/7/95 or alternatively for certification to the Fourth Circuit. (ghay)

6/19/95 156 MEMORANDUM by plaintiff Sierra Club, plaintiff CLEAN, Inc. , plaintiff Friends of the Earth in opposition to [143-1] motion for partial summary judgment in favor of defendant Laidlaw. (ghay)

6/26/95 158 MOTION by plaintiff Sierra Club, plaintiff CLEAN, Inc. , plaintiff Friends of the Earth for leave to file Reply to Defendant's Response in Opposition to Plaintiff's motion for partial summary judgment. (ghay)

6/26/95 161 AMENDED BRIEF by amicus SC Chamber Commerce, amicus SC Textile Mfrs. (ghay)

6/27/95 -- Motion hearing re: [158-1] motion for leave to file Reply to Defendant's Response in Opposition to Plaintiff's motion for partial summary judgment. , [147-1] motion for expedited discovery and postponement of oral argument on the cross motions for partial summary judgment, [145-1] motion for

reconsideration of [133-1] findings of fact order of 4/7/95 or alternatively for certification to the Fourth Circuit. , [143-1] motion for partial summary judgment in favor of defendant Laidlaw. , [139-1] motion for partial summary judgment in favor of plaintiffs. , [137-1] motion to serve supplemental discovery. Both motions for discovery, moot. Motion for reconsideration, denied. Plaintiff's motion for S/J, denied. Defendants' motion for partial S/J, granted, in part. Plaintiff's motion for leave to file, granted. (JFA,jr/Jane LaPorte). (bwil)

6/27/95 -- Minute entry: granting [158-1] motion for leave to file Reply to Defendant's Response in Opposition to Plaintiff's motion for partial summary judgment. , mooting [147-1] motion for expedited discovery and postponement of oral argument on the cross motions for partial summary judgment, denying [145-1] motion for reconsideration of [133-1] findings of fact order of 4/7/95 or alternatively for certification to the Fourth Circuit. , granting [143-1] motion for partial summary judgment in favor of defendant Laidlaw. , denying [139-1] motion for partial summary judgment in favor of plaintiffs. , mooting [137-1] motion to serve supplemental discovery. (bwil)

6/27/95 192 REPLY by plaintiff Friends of the Earth, plaintiff CLEAN, Inc. , plaintiff Sierra Club to defendant's response to plaintiff's [139-1] motion for partial summary judgment in favor

of plaintiffs. [Filed pursuant to ruling granting plaintiffs leave to reply.]. (ghay) [Entry date 06/05/96]

6/29/95 162 Minute order: directing that two motions for discovery are moot; motion for leave to file is granted, deft's motion for summary judgment is granted, in part and denied, in part, and plaintiff's motion for summary judgment is denied. mld eod 6/29/95. (bwil)

7/10/95 163 ORDER denying defendant's [145-1] motion for reconsideration of [133-1] findings of fact order of 4/7/95 and denying alternatively for certification to the Fourth Circuit. (signed by Judge Joseph F. Anderson Jr.) eod mld 7/10/95. (ghay)

7/31/95 -- Bench trial (Phase II) held before Judge Joseph F. Anderson Jr. /Jane LaPorte. Opening statements. WITNESSES/EXHIBITS. (bwil) [Entry date 08/01/95]

8/1/95 -- Bench trial (Phase II) held before Judge Joseph F. Anderson Jr. /Jane LaPorte. WITNESSES/EXHIBITS. (bwil) [Entry date 08/02/95]

8/2/95 -- Bench trial (Phase II) held before Judge Joseph F. Anderson Jr. /Jane LaPorte. WITNESSES/EXHIBITS. Court takes under advisement and will issue written order. Counsel to submit proposed Findings of Fact and Conclusions of Law (limited to 35 pages)

within 45 days. (bwil)

10/13/95 173 MOTION by defendant Laidlaw Environ to reopen the record for receiving newling discovered evidence. (ghay) [Entry date 10/17/95]

10/13/95 174 MEMORANDUM by defendant Laidlaw Environ in support of its [173-1] motion to reopen the record for receiving newling discovered evidence. (ghay) [Entry date 10/17/95]

10/13/95 175 BRIEF by defendant Laidlaw Environ re: noncompliance date of the Lancy Metals Removal System. (ghay) [Entry date 10/17/95]

10/13/95 176 BRIEF by defendant Laidlaw Environ re: Proposed Findings of Fact and Conclusions of Law. (ghay) [Entry date 10/17/95]

10/16/95 171 BRIEF/PROPOSED POST TRIAL FINDINGS OF FACT AND CONCLUSIONS OF LAW by plaintiff Friends of the Earth. Part of this document is filed under SEAL pursuant to the court's 11/24/93 protective order. (ghay)

10/17/95 177 POST TRIAL BRIEF by plaintiff Friends of the Earth (ghay) [Entry date 10/18/95]

12/19/95 191 NOTICE of Subsequent Precedent by defendant Laidlaw. Re: Employers Ins Co. of Wausau. (ghay) [Entry date 06/05/96]

1/29/96 180 RESPONSE by plaintiff Friends of the Earth, plaintiff CLEAN, Inc. , plaintiff Sierra Club to [173-1] motion to reopen the record for receiving newling discovered evidence. (ghay) [Entry date 01/30/96]

1/29/96 181 CROSS MOTION by plaintiff Friends of the Earth, plaintiff CLEAN, Inc. , plaintiff Sierra Club to reopen record so that the two M⌂DMR reports be received into evidence. (ghay) [Entry date 01/30/96]

1/29/96 182 MEMORANDUM by plaintiff Friends of the Earth, plaintiff CLEAN, Inc. , plaintiff Sierra Club in support of [181-1] motion to reopen record so that the two M⌂DMR reports be received into evidence. (ghay) [Entry date 01/30/96]

2/1/96 -- SET CLOSING ARGUMENT AND Motion hearing re: [181-1] motion to reopen record so that the two M⌂DMR reports be received into evidence and [173-1] motion to reopen the record for receiving newly discovered evidence at 2:00 2/29/96 (ghay)

2/13/96 183 RESPONSE by defendant Laidlaw Environ to [181-1] motion to reopen record so that the two M⌂DMR reports be received evidence. (ghay) [Entry date 02/16/96]

2/20/96 184 REPLY/RESPONSE by plaintiff CLEAN, Inc., plaintiff Friends of the Earth to defendant's notice of subsequent precedent and defendant's

letters of 1/20 and 2/9/96. (ghay) [Entry date 02/26/96]

2/23/96 185 REPLY by plaintiff CLEAN, Inc., plaintiff Friends of the Earth to response to [181-1] motion to reopen record so that the two M⌂DMR reports be received into evidence. (ghay) [Entry date 02/26/96]

2/29/96 -- Motion hearing re: [181-1] motion to reopen record so that the two M⌂DMR reports be received into evidence. Motion hearing held, [173-1] motion to reopen the record for receiving newling discovered evidence. Motion hearing held. Court takes under advisement and will issue written order. Court hears closing arguments and directs counsel to submit amended Findings within 21 days. (bwil)

2/29/96 -- Minute entry: [181-1] motion to reopen record so that the two M⌂DMR reports be received into evidence. taken under advisement, [173-1] motion to reopen the record for receiving newling discovered evidence. taken under advisement (bwil)

3/15/96 -- Mediation/Settlement conference set on 10:00 3/19/96 before Magistrate Judge Bristow Marchant. (ghay)

4/16/96 187 MOTION by defendant Laidlaw Environ to dismiss plaintiff's complaint as moot. (ghay) [Entry date 04/19/96]

4/16/96 188 MEMORANDUM by defendant Laidlaw Environ in support of its [187-1] motion to dismiss plaintiff's complaint as moot. (ghay) [Entry date 04/19/96]

4/30/96 189 RESPONSE by plaintiffs to defendant's [187-1] motion to dismiss plaintiff's complaint as moot. (ghay)

5/7/96 190 REPLY by defendant Laidlaw Environ to plaintiff's response to defendant's [187-1] motion to dismiss plaintiff's complaint as moot. (ghay) [Entry date 05/09/96]

9/18/96 193 ORDER denying defendant's [187-1] motion to dismiss plaintiff's complaint as moot. (signed by Judge Joseph F. Anderson Jr.) eod mld 9/18/96. (ghay)

9/23/96 194 ORDER granting defendant Laidlaw's [173-1] motion to reopen the record for receiving newling discovered evidence. (signed by Judge Joseph F. Anderson Jr.) eod mld 9/23/96. (ghay)

9/23/96 195 ORDER granting plaintiff's [181-1] motion to reopen record so that the two M⌂DMR reports be received into evidence. (signed by Judge Joseph F. Anderson Jr.) eod mld 9/23/96. (ghay)

10/3/96 -- Tele-conference held with Magistrate Judge Bristow Marchant's Law Clerk and Bruce Terris and Don Cockrill: Both parties informed Clerk

that the case was not ready for a hearing due to ongoing discovery; Clerk requested that both parties notify the Judge in writing of the status of the case. (entered AT DIRECTION OF COURT) (will) [Entry date 10/04/96]

12/19/96 196 STIPULATION AND ORDER regarding U. S. Filter and the Lancy treatment system. The full transcript of the Rule30(b)(6) deposition of US Filter is admitted [and docketed separately] as part of the record in this case. By 12/20/96 each party shall submit a brief to the court addressing the impact of the guaratee to the issues in the case and provide any revisions to the party's proposed findings of fact and conclusions of law. (signed by Judge Joseph F. Anderson Jr.) eod mld 12/20/96 cc: all counsel (without attached deposition). (ghay) [Entry date 12/20/96]

12/19/96 197 DEPOSITION of Stanley R. Karrs. P. E. (filed pursuant to 196-1 order of Judge Joseph F. Anderson, Jr.). (ghay) [Entry date 12/20/96]

1/22/97 198 FINDINGS OF FACT AND CONCLUSIONS OF LAW: the court holds that it has jurisdiction over defendant's violations of its NPDES permit and the Clean Water Act; defendant is liable for the violation of the mercury discharge limitation and the violation of the monitoring and reporting requirements of its NPDES permit; and a civil penalty of $405,800.00 is assessed against defendant

Laidlaw. The plaintiff's request for a permanent injunction is denied. (signed by Judge Joseph F. Anderson Jr.) eod mld 1/22/97. (ghay)

1/22/97 199 JUDGMENT that defendant Laidlaw is assessed a civil penalty in the amount of $405,800.00 for violations of mercury discharge limitation and violations of monitoring and reporting requirements of its NPDES permit and the Clean Water Act. Interest (post-judgment): 5. 61% (signed by clerk; approved by Judge Joseph F. Anderson Jr.) eod mld 1/22/97. (ghay)

1/22/97 -- Case closed (ghay)

2/19/97 207 NOTICE OF APPEAL by plaintiff Sierra Club, plaintiff Citizens Local Env, plaintiff Friends of the Earth Re: [199-1] judgment order, [198-1] findings of fact order Fee Status: PAID, 300/11968 (cham)

2/19/97 208 NOTICE OF APPEAL by defendant Laidlaw Environ Re: [199-1] judgment order Fee Status: PAID, 600/3630 (cham) [Entry date 02/22/97]

2/20/97 -- Notice of appeal and certified copy of docket to USCA: [207-1] appeal by Friends of the Earth, Citizens Local Sierra Club (cham)

2/22/97 -- Notice of appeal and certified copy of docket to USCA: [208-1] appeal by Laidlaw Environ (cham)

2/27/97 -- NOTICE of Docketing ROA from USCA Re: [207-1] appeal by Friends of the Earth, Citizens Local Env, Sierra Club NUMBER: 97-1246, Donna Brown (cham) [Entry date 02/28/97]

3/3/97 -- NOTICE of Docketing ROA from USCA Re: [208-1] appeal by Laidlaw Environ USCA NUMBER: 97-1261, 97-1246(L), Donna Brown (cham)

5/12/97 214 TRANSCRIPT filed [207-1] appeal by Friends of the Earth, Citizens Local Env, Sierra Club, [208-1] appeal by Laidlaw Environ for dates of 6/30/93 hearing (cham)

7/23/97 219 Certificate that the Record on Appeal is Complete for [207-1] appeal by Friends of the Earth, Citizens Local Sierra Club, [208-1] appeal by Laidlaw Environ (cham)

7/20/98 223 Opinion of the 4th Circuit vacated and remanded with instructions to dismiss the action; re: [207-1] appeal by Friends of the Earth, Citizens Local Env, Sierra Club, [208-1] appeal by Laidlaw Environ (cham)

8/10/98 224 JUDGMENT OF USCA (certified copy) vacates the judgment of the District Court, and remands the case for further proceedings consistent with this opinion; Re: [207-1] appeal by Friends of the Earth, Citizens Local Env, Sierra Club, [208-1] appeal by Laidlaw Environ (cham)

8/17/98 -- Record on Appeal returned from U. S. Court of Appeals: [207-1] appeal, [208-1] appeal (cham)

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA

FRIENDS OF THE EARTH, INC.,
218 D Street, S.E.
Washington, D.C. 20003
(202) 544-2600

and

CITIZENS LOCAL ENVIRONMENTAL ACTION NETWORK, INC.,
P.O. Box 50529
Columbia, South Carolina 29250

and

SIERRA CLUB
730 Polk Street
San Francisco, California 94109

Plaintiffs,

v.

LAIDLAW ENVIRONMENTAL SERVICES (TOC), INC.,
100 Executive Center Drive
Santee Building, Suite 128
Columbia, South Carolina 29210

Defendant.

Civil No. 3:92-1697-17

THIRD AMENDED COMPLAINT AND REQUEST FOR INJUNCTIVE RELIEF

INTRODUCTION

1. This is a citizen's suit, brought under Section 505 of the Federal Water Pollution Control Act (hereafter "the Act"), as amended, 33 U.S.C. 1365, to remedy defendant's repeated violations of the terms and conditions of its National Pollutant Discharge Elimination System (hereafter "NPDES") permit number SCO040517 for its facility located in Roebuck, Spartanburg County, South Carolina (hereafter the "facility"), which constitute violations of Sections 301(a), 308(a) and 402

of the Act, 33 U.S.C. 1311 (a), 1318 (a) and 1342. Plaintiffs seek a declaratory judgment, injunctive relief, the imposition of civil penalties and the award of costs, including attorneys' and expert witness' fees, for defendant's violations of the terms and conditions of its permit, including, but not limited to, the discharge limitations and the monitoring and reporting requirements.

JURISDICTION AND VENUE

2. This Court has subject matter jurisdiction under Section 505(a) of the Act, 33 U.S.C. 1365 (a).

3. On April 10, 1992, plaintiff Friends of the Earth, Inc. (hereafter "FOE"), gave notice of the violations and their intent to file suit to the Administrator of the United States Environmental Protection Agency (hereafter "EPA"), to the South Carolina Department of Health and Environmental Control (hereafter "DHEC"), and to defendant, as required by Section 505(b)(1)(A) of the Act, 33 U.S.C. 1365(b)(1)(A). A copy of this notice is attached as Appendix A.

4. On September 24, 1993, plaintiffs gave notice of additional violations and their intent to file suit to EPA, DHEC, and to defendant (hereafter the "September 1993 Notice"), as required by Section 505(b)(1)(A) of the Act, 33 U.S.C. 1365(b)(1)(A). A copy of the September 1993 Notice is attached as Appendix B.

5. More than 60 days have passed since the September 1993 Notice was served. To the best of plaintiffs' knowledge, EPA has not commenced and is not diligently prosecuting a civil or criminal action concerning the violations alleged in this complaint. While DHEC commenced a civil action in state court concerning these violations on June 9, 1992, this action was commenced at the request of defendant and was not diligently prosecuted. The action was settled

before the suit was filed through a Consent Order and Decree which provided inadequate remedies for defendant's violations of its permit and the Act. Prior to the issuance of the April 10, 1992, notice letter, neither EPA nor DHEC commenced an administrative civil penalty action under Section 309(g)(6) of the Act, 33 U.S.C. 1319(g)(6).

6. Venue is appropriate in the District of South Carolina pursuant to Section 505(c)(1) of the Act, 33 U.S.C. 1365(c)(1), because the violations complained of occurred within this District.

PARTIES

Plaintiffs

7. Plaintiff FOE sues on behalf of itself and its members. FOE is a not-for-profit corporation organized under the laws of the State of New York, with its principal place of business in Washington, D.C. FOE is a membership organization with approximately 40,000 members residing in all states of the United States. FOE is dedicated to the protection and enhancement of the natural resources of this country including air, water and land. More specifically, on the basis of its research on compliance with water pollution control laws, FOE reports to its members about the level of water pollution law violations and FOE's enforcement efforts; proposes legislation to amend the Federal Water Pollution Control Act; and brings litigation against dischargers of pollutants, including dischargers into South Carolina waters, who violate their NPDES permits. FOE's members are greatly concerned about water quality and FOE has a long history of involvement in clean water activities on both the local and national levels. The interests of FOE and its members have been, are being, and will be adversely affected by defendant's

violations of the terms and conditions of its permit.

8. Members of FOE reside in the vicinity of, or own property or recreate in, on or near the waters of the North Tyger River and waters downstream affected by the facility's discharge of pollutants pursuant to defendant's NPDES permit number SCOO40517. The quality of the waters of the State of South Carolina, especially the portions of the North Tyger River and waters downstream affected by the facility's discharge, directly affects the health, economic, recreational, aesthetic and environmental interests of FOE's members. Defendant's discharge of pollutants in violation of its permit number SCOO40517 has adversely affected, is adversely affecting, and will continue adversely to affect, the health, economic, recreational, aesthetic and environmental interests of FOE's members.

9. FOE's ability to protect and improve the waters of South Carolina requires accurate and complete information regarding the discharge of pollutants. Defendant's actions in failing to monitor and report discharges from the facility properly in violation of its permit interfere with efforts of FOE to research the compliance status of South Carolina dischargers with water pollution control laws and report the results of that research to FOE members; propose legislation to amend the Federal Water Pollution Control Act; and bring litigation against defendant to prevent violations of the effluent limitations in defendant's permit and thereby protect the waters of the North Tyger River and waters downstream affected by the facility's discharge. The interests of FOE have been, are being and will be adversely affected by defendant's violation of the terms and conditions of its NPDES permit number SCOO40517.

10. Defendant's actions in failing to monitor and report properly in violation of its permit number SCOO40517 interfere with efforts of FOE's members to protect their health,

economic, recreational, aesthetic and environmental interests by interfering with their ability to take action on their own behalf. Defendant's actions further interfere with FOE's efforts on behalf of its members to research the status of compliance of South Carolina dischargers with water pollution control laws and report the results of that research to FOE members; propose legislation to amend the Federal Water Pollution Control Act; and bring litigation against defendant to prevent violations of the effluent limitations in defendant's permit and thereby protect the waters of the North Tyger River and waters downstream affected by the facility's discharge. Defendant's violations of the monitoring and reporting requirements of its NPDES permit number SCOO40517 have adversely affected, are adversely affecting, and will continue adversely to affect the health, economic, recreational, aesthetic and environmental interests of FOE's members.

11. Plaintiff Citizens Local Environmental Action Network, Inc. (hereafter "CLEAN") sues on behalf of itself and its members. CLEAN is a not-for-profit corporation organized under the laws of the State of South Carolina, with its principal place of business in Columbia, South Carolina. CLEAN is a statewide coalition representing 30 groups and individual members dedicated, among other things, to protecting and improving the quality of the waters of South Carolina. CLEAN is committed to protecting and improving the quality of South Carolina's streams, lakes and rivers. More specifically, CLEAN reports to its members, the citizens of South Carolina, and the South Carolina legislature about the condition of South Carolina waters and enforcement efforts by regulatory agencies; testifies before DHEC, the South Carolina Land Resources Conservation Commission, and the South Carolina legislature on efforts to protect the quality of South Carolina waters; submits comments on draft NPDES permits which allow discharges to South Carolina waters; proposes state

legislation to protect South Carolina waters; and brings litigation against dischargers of pollutants into South Carolina waters who violate their NPDES permits. The interests of CLEAN and its members have been, are being and will be adversely affected by defendant's violation of the terms and conditions of its NPDES permit number SCOO40517.

12. Members of CLEAN reside in the vicinity of, or own property or recreate in, on or near the waters of the North Tyger River and waters downstream affected by the facility's discharge of pollutants pursuant to defendant's NPDES permit number SCOO40517. The quality of the waters of the State of South Carolina, especially the portions of the North Tyger River and waters downstream affected by the facility's discharge, directly affects the health, economic, recreational, aesthetic and environmental interests of CLEAN's members. Defendant's discharge of pollution in violation of its permit has adversely affected, is adversely affecting, and will continue adversely to affect the health, economic, recreational, aesthetic and environmental interests of CLEAN's members.

13. CLEAN's ability to protect and improve the waterways of South Carolina requires accurate and complete information regarding the discharge of pollutants. Defendant's actions in failing to monitor and report discharges from the facility properly in violation of its permit interfere with efforts of CLEAN to research the status of compliance of South Carolina dischargers with water pollution control laws and report the results of that research to CLEAN members, the public and the South Carolina legislature; submit comments on water pollution control regulations; lead efforts to protect South Carolina waters; submit comments on NPDES permits; and bring litigation against defendant to prevent violations of the effluent limitations in defendant's permit and thereby protect the waters of the North Tyger River and waters downstream affected by the facility's discharge. The interests of CLEAN

have been, are being and will be adversely affected by defendant's violation of the terms and conditions of its NPDES permit number SCOO40517.

14. Defendant's actions in failing to monitor and report properly in violation of its permit number SCOO40517 interfere with efforts of CLEAN's members to protect their health, economic, recreational, aesthetic and environmental interests by interfering with their ability to take action on their own behalf. Defendant's actions further interfere with CLEAN's efforts on behalf of its members to research the status of compliance of South Carolina dischargers with water pollution control laws and report the results of that research to CLEAN members, the public and the South Carolina legislature; testify before state agencies and the state legislature; submit comments on NPDES permits; and bring litigation against defendant to prevent violations of the effluent limitations in defendant's permit and thereby protect the waters of the North Tyger River and waters downstream affected by the facility's discharge. Defendant's violations of the monitoring and reporting requirements of its NPDES permit number SCOO40517 have adversely affected, are adversely affecting, and will continue adversely to affect the health, economic, recreational, aesthetic and environmental interests of CLEAN's members.

15. Plaintiff Sierra Club sues on behalf of itself and its members. The Sierra Club is a not-for-profit corporation organized under the laws of the State of California, with its principal place of business in San Francisco, California. The Sierra Club is a membership organization with approximately 600,0000 members residing in all states of the United States. The Sierra Club is dedicated to the protection and enhancement of the natural resources of this country including air, water and land. More specifically, on the basis of its research on compliance with water pollution control laws, the Sierra Club

reports to its members about the level of water pollution law violations and the Sierra Club's enforcement efforts; proposes legislation to amend the Federal Water Pollution Control Act; and brings litigation against dischargers of pollutants, including dischargers into South Carolina waters, who violate their NPDES permits. The Sierra Club's members are greatly concerned about water quality and the Sierra Club has a long history of involvement in clean water activities on both the local and national levels. The interests of the Sierra Club and its members have been, are being, and will be adversely affected by defendant's violations of the terms and conditions of its permit.

16. Members of the Sierra Club reside in the vicinity of, or own property or recreate in, on or near the waters of the North Tyger River and waters downstream affected by the facility's discharge of pollutants pursuant to defendant's NPDES permit number SC0040517. The quality of the waters of the State of South Carolina, especially the portions of the North Tyger River and waters downstream affected by the facility's discharge, directly affects the health, economic, recreational, aesthetic and environmental interests of the Sierra Club's members. Defendant's discharge of pollutants in violation of its permit number SC0040517 has adversely affected, is adversely affecting, and will continue adversely to affect, the health, economic, recreational, aesthetic and environmental interests of the Sierra Club's members.

17. The Sierra Club's ability to protect and improve the waters of South Carolina requires accurate and complete information regarding the discharge of pollutants. Defendant's actions in failing to monitor and report discharges from the facility properly in violation of its permit interfere with efforts of the Sierra Club to research the compliance status of South Carolina dischargers with water pollution control laws and report the results of that research to Sierra Club members;

propose legislation to amend the Federal Water Pollution Control Act; and bring litigation against defendant to prevent violations of the effluent limitations in defendant's permit and thereby protect the waters of the North Tyger River and waters downstream affected by the facility's discharge. The interests of the Sierra Club have been, are being and will be adversely affected by defendant's violation of the terms and conditions of its NPDES permit number SC0040517.

18. Defendant's actions in failing to monitor and report properly in violation of its permit number SC0040517 interfere with efforts of the Sierra Club's members to protect their health, economic, recreational, aesthetic and environmental interests by interfering with their ability to take action on their own behalf. Defendant's actions further interfere with the Sierra Club's efforts on behalf of its members to research the status of compliance of South Carolina dischargers with water pollution control laws and report the results of that research to Sierra Club members; propose legislation to amend the Federal Water Pollution Control Act; and bring litigation against defendant to prevent violations of the effluent limitations in defendant's permit and thereby protect the waters of the North Tyger River and waters downstream affected by the facility's discharge. Defendant's violations of the monitoring and reporting requirements of its NPDES permit number SC0040517 have adversely affected, are adversely affecting, and will continue adversely to affect the health, economic, recreational, aesthetic and environmental interests of the Sierra Club's members.

Defendant

19. Defendant Laidlaw Environmental Services (TOC), Inc., is a private corporation organized under the laws of the State of South Carolina. Defendant is doing business in

Roebuck, Spartanburg County, South Carolina, where it operates the facility.

FACTS

20. Pursuant to Section 402 of Act, DHEC issued NPDES permit number SC0040517 to defendant for the facility on December 15, 1986. The permit authorizes defendant to discharge limited quantities of pollutants from the facility into the North Tyger River. The North Tyger River is a navigable water of the United States.

21. Section 308 of the Act, 33 U.S.C. 1318. authorizes the Administrator to require NPDES permittees to establish and maintain records; install, use and maintain monitoring equipment, sample effluents; and report on a regular basis to the permit-issuing agency regarding defendant's discharge of pollutants. The reports consist of discharge monitoring reports (hereafter "DMRs") and noncompliance reports (hereafter "NCRs").

22. Defendant has submitted DMRs and NCRs to DHEC since at least April 1987. Defendant has also prepared laboratory reports reflecting its monitoring results and daily logs showing mercury concentrations since at least April 1987. Appendix A, plaintiffs' Notice of Intent to Sue of April 10, 1992, and Appendix B, plaintiffs' Notice of Intent to Sue of September 24, 1993, list numerous violations of the effluent limitations and monitoring and reporting requirements which have been taken from the DMRs and NCRs submitted by defendant pursuant to NPDES permit number SCOO40517 and from defendant's laboratory reports and mercury logs. Appendices A and B are incorporated herein by reference.

23. Defendant's violations of the Act have been numerous and repeated. Over the almost seven-year period covered by Appendices A and B, defendant violated the terms

and conditions of its permit at least 2300 times. Because of this extensive history of violations of the terms and conditions of NPDES permit numbers SCOO40517, plaintiffs believe and allege that defendant may have violated its permit on additional occasions prior to, during, and subsequent to the period of the violations listed in Appendices A and B.

24. Because of this extensive history of violations of the effluent standards and limitations imposed by defendant's NPDES permit number SCOO40517, plaintiffs believe and allege that, without the imposition of appropriate civil penalties and the issuance of an injunction, defendant will continue to violate its permit to the further injury of plaintiffs, their members and other members of the public.

CLAIM

25. Section 301(a) of the Federal Water Pollution Control Act, 33 U.S.C. 1311(a), prohibits the discharge of pollutants from a point source into navigable waters of the United States, unless in compliance with various enumerated sections of the Act. Section 301(a) prohibits, inter alia, such discharges not authorized by, or in violation of, the terms and conditions of an NPDES permit issued pursuant to Section 402 of the Act, 33 U.S.C. 1342. Section 402(k) provides that compliance with the terms and conditions of a permit issued pursuant to that section shall be deemed compliance with, inter alia, Section 301 of the Act.

26. Pursuant to Sections 308 and 402 of the Federal Water Pollution Control Act, 33 U.S.C. 1318 and 1342, defendant's NPDES permit number SCOO40517 requires it to monitor the facility's discharge and to report monitoring and sampling information regarding its discharge.

27. Sections 305(a) and 305(f)(6) of the Federal Water Pollution Control Act, 33 U.S.C. 1365(a) and 1365(f)(6),

authorize citizens to enforce "a permit or condition thereof," including the effluent limitations and monitoring and reporting requirements of an NPDES permit.

28. Defendant has failed in numerous instances, including, but not limited to, those listed in Appendix A, the reporting and monitoring violations listed in Appendix B, and discharge violations 31-32 and 34-1044 in Appendix B, to comply with NPDES permit number SCOO40517, including failures to comply with the effluent limitations and to monitor and report its discharge properly. As a result, it has violated Sections 301, 308 and 402 of the Act, 33 U.S.C. 1311, 1318 and 1342.

RELIEF

Wherefore, plaintiffs respectfully request this Court to grant the following relief:

A. Issue a declaratory judgment that defendant has violated, and continues to be in violation of, Sections 301, 308 and 402 of the Federal Water Pollution Control Act, 33 U.S.C. 1311, 1318 and 1342;

B. Enjoin defendant from operating its facility in such a manner as will result in the further violation of NPDES permit number SCOO40517 and Sections 301, 308 and 402 of the Act, 33 U.S.C. 1311, 1318 and 1342;

C. Order defendant to comply with all effluent limitations, monitoring and reporting requirements, and other terms and conditions of NPDES permit number SCOO40517;

D. Order such other injunctive relief as the Court deems appropriate, including restitution and mitigation;

E. Order defendant to provide plaintiffs with a copy of all monitoring results, reports and other documents which defendant submits to the federal or state government

regarding NPDES permit number SCOO40517 at the time they are submitted to these authorities and all monitoring results which are not submitted to the federal or state government within 10 days of their receipt by defendant;

F. Order defendant to pay appropriate civil penalties for each violation of NPDES permit number SCOO40517, pursuant to Sections 309(d) and 505(a) of the Act, 33 U.S.C. 1319(d) and 1365(a), including those listed in Appendix A, the reporting and monitoring violations listed in Appendix B, the discharge violations 31-32 and 34-1044 in Appendix B, and all violations committed by defendant in addition to those listed in Appendices A and B;

G. Award plaintiffs their costs, including reasonable attorneys' and expert witness' fees, as authorized by Section 505(d) of the Act, 33 U.S.C. 1365(d); and

H. Award such other relief as this Court deems appropriate.

Respectfully submitted,

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(803) 252-1419

Counsel for Plaintiffs

November 24, 1993

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

FRIENDS OF THE EARTH, INC.,
218 D Street, S.E.
Washington, D.C. 20003
(202) 544-2600

and

CITIZENS LOCAL ENVIRONMENTAL ACTION NETWORK, INC.
P.O. BOX 50529
Columbia, South Carolina 29250

and

SIERRA CLUB
730 Polk Street
San Francisco, California 94109

Plaintiffs,

v.

LAIDLAW ENVIRONMENTAL SERVICES (TOC) INC.,
100 Executive Center Drive
Santee Building, Suite 128
Columbia, South Carolina 29210

Defendant.

Civil No. 3-92-1697-17

ANSWER TO AMENDED COMPLAINT

COMES NOW, Laidlaw Environmental Services (TOC), Inc., Defendant herein, and hereby files and serves its Answer To Plaintiffs' Amended Complaint as follows:

FIRST DEFENSE

Defendant answers the numbered paragraphs of Plaintiffs' Amended Complaint as follows:

1.

Answering paragraph 1 of the Amended Complaint, Defendant admits that Plaintiffs purport to bring this action pursuant to Section 505 of the Federal Water Pollution Control Act, as amended, 33 U.S.C. § 1365. Defendant denies that Plaintiffs are entitled to maintain this action and Defendant further denies all remaining allegations contained in said paragraph.

2.

Defendant denies each and every allegation contained in paragraph 2 of the Amended Complaint.

3.

Answering paragraph 3 of the Amended Complaint, Defendant admits that it received a letter from Plaintiff Friends of the Earth ("FOE") dated April 10, 1992, which purported to give Defendant sixty days notice of FOE's intent to sue. Defendant denies that a copy of this notice was attached as an appendix to the proposed Amended Complaint received by Defendant. Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in said paragraph.

4.

Answering paragraph 4 of the Amended Complaint, Defendant admits that more than sixty days passed between the date that FOE's notice was purportedly sent to Defendant and the date Plaintiffs' proposed Amended Complaint was received by Defendant. Further answering, Defendant admits that the United States Environmental Protection Agency ("EPA") has not commenced any administrative, civil, or criminal action against Defendant. Further answering, Defendant admits that the South Carolina Department of Health and Environmental Control ("DHEC") commenced a civil action in State Court against Defendant on June 9, 1992, and that a Consent Order and Decree was entered in that civil action on June 10, 1992. Defendant denies all remaining allegations contained in said paragraph.

5.

Answering paragraph 5 of the Amended Complaint, Defendant admits that venue is appropriate in this Court. Defendant denies all remaining allegations contained in said paragraph.

6.

Answering paragraph 6 of the Amended Complaint, Defendant denies that the interests of FOE or its members have been, are being, or will be, adversely affected by any alleged violations of Defendant's NPDES permit. Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in said paragraph.

7.

Answering paragraph 7 of the Amended Complaint, Defendant denies that the health, economic, recreational, aesthetic and/or environmental interests of FOE's members have been adversely affected, are being adversely affected, or will be adversely affected, by any alleged violations of Defendant's NPDES permit. Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in said paragraph.

8.

Answering paragraph 8 of the Amended Complaint, Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in the first sentence of said paragraph. Defendant denies all remaining allegations contained in said paragraph.

9.

Defendant denies each and every allegation contained in paragraph 9 of the Amended Complaint.

10.

Answering paragraph 10 of the Amended Complaint, Defendant denies that the interests of CLEAN or its members have been, are being, or will be, adversely affected by any alleged violations of Defendant's NPDES permit. Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in said paragraph.

11.

Answering paragraph 11 of the Amended Complaint, Defendant denies that the health, economic, recreational, aesthetic, and/or environmental interests of CLEAN's members have been adversely affected, are being adversely affected, or will be adversely affected by any alleged violations of the Defendant's NPDES permit. Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in said paragraph.

12.

Answering paragraph 12 of the Amended Complaint, Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in the first sentence of said paragraph. Defendant denies all remaining allegations contained in said paragraph.

13.

Defendant denies each and every allegation contained in paragraph 13 of the Amended Complaint.

14.

Answering paragraph 14 of the Amended Complaint, Defendant denies that the interests of the Sierra Club or its members have been, are being, or will be, adversely affected by any alleged violations of Defendant's NPDES permit. Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in said paragraph.

15.

Answering paragraph 15 of the Amended Complaint, Defendant denies that the health, economic, recreational, aesthetic, and/or environmental interests of the Sierra Club's members have been adversely affected, are being adversely affected, or will be adversely affected, by any alleged violations of Defendant's NPDES permit. Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in said paragraph.

16.

Answering paragraph 16 of the Amended Complaint, Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in the first sentence of said paragraph. Defendant denies all remaining allegations contained in said paragraph.

17.

Defendant denies each and every allegation contained in paragraph 17 of the Amended Complaint.

18.

Defendant admits the allegations contained in paragraph 18 of the Amended Complaint.

19.

Answering paragraph 19 of the Amended Complaint, Defendant admits that DHEC has issued an NPDES permit to Defendant to discharge treated effluent into the North Tyger

River. Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in said paragraph.

20.

Answering paragraph 20 of the Amended Complaint, Defendant admits the first sentence of said paragraph, which is merely a summary of portions of Section 308 of the Act. Further answering, Defendant admits that reports submitted to DHEC consist both of discharge monitoring reports (DMRs) and non-compliance reports (NCRs).

21.

Answering paragraph 21 of the Amended Complaint, Defendant admits that it has submitted DMRs and NCRs since at least January, 1990. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations regarding appendices A and B, since no such appendices were attached to the proposed Amended Complaint Defendant received from Plaintiffs. Further answering, to the extent said appendices are similar or identical to those attached to Plaintiff's original Complaint, which was filed with this Court on June 12, 1992, Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegation that information contained in those appendices was taken directly from DMRs and NCRs submitted by Defendant to DHEC. Defendant denies all remaining allegations contained in said paragraph.

22.

Answering paragraph 22 of the Amended Complaint,

Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations regarding information purportedly reported on Appendix B to the Amended Complaint, since no such appendix was attached to the proposed Amended Complaint received by Defendant. Defendant denies all remaining allegations contained in said paragraph.

23.

Defendant denies each and every allegation contained in paragraph 23 of the Amended Complaint.

24.

Answering paragraph 24 of the Amended Complaint, Defendant admits that said paragraph summarizes certain portions of Sections 301 and 402 of the Act.

25.

Answering paragraph 25 of the Amended Complaint, Defendant admits that its NPDES permit contains several elements and sets forth several conditions, including certain monitoring and reporting requirements.

26.

Defendant denies each and every allegation contained in paragraphs 26 and 27 of the Amended Complaint.

27.

Defendant denies that Plaintiffs are entitled to any relief

whatsoever, including that specifically requested in paragraphs A through H of the Prayer for Relief.

28.

Further answering, Defendant expressly denies each and every allegation contained in the Amended Complaint that has not been admitted, denied, or otherwise responded to in this Answer.

SECOND DEFENSE

Plaintiffs' Amended Complaint fails to state a claim upon which relief can be granted.

THIRD DEFENSE

Plaintiffs' claims are barred, in whole or in part, by the applicable statute(s) of limitations.

FOURTH DEFENSE

Plaintiff's Amended Complaint should be dismissed for insufficiency of service of process.

FIFTH DEFENSE

Plaintiffs' claims are barred for lack of standing.

SIXTH DEFENSE

Plaintiffs' claims are barred under Section 505(b) of the Act by reason of a prior civil action filed by DHEC and a judicial decree entered thereon by the Court of Common Pleas,

Spartanburg County, South Carolina, Civil Action No. 92-CP-42-1429, covering each and every claim raised by Plaintiffs in their Amended Complaint.

SEVENTH DEFENSE

Alternatively, Plaintiffs' claims are barred by Section 505(b) of the Act because DHEC has commenced and is diligently prosecuting a civil action in the Court of Common Pleas, Spartanburg County, South Carolina, Civil Action No. 92-CP-42-1429, to require compliance with the NPDES permit that is the subject of Plaintiffs' lawsuit.

EIGHTH DEFENSE

The claims of Plaintiffs CLEAN and Sierra Club are barred by lack of subject matter jurisdiction because neither of these organizations provided written notice of their intent to sue as required by Section 505(b) of the Act.

NINTH DEFENSE

Alternatively, the claims of CLEAN and Sierra Club should be dismissed for their failure to comply with the condition precedent of providing written notice of their intent to sue as required by Section 505(b) of the Act.

Respectfully submitted,

OGLETREE, DEAKINS, NASH,
SMOAK AND STEWART

_____

Michael S. Thwaites

Ronald E. Cardwell
Federal I.D. No. 5038

[CERTIFICATE OF SERVICE OMITTED]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Friends of the Earth, et al,	)	
	)	C/A No. : 3:92-1697-17
Plaintiffs,	)	
v.	)	
	)	ORDER
Laidlaw Environmental Services,	)	
	)	
Defendant.	)	
	)	

Plaintiffs Friends of the Earth, Inc. ("FOE") and Citizens Local Environmental Action Network ("CLEAN") brought this action against defendant Laidlaw Environmental Services, Inc. ("TOC") as a citizens suit under Section 505 of the Federal Water Pollution Control Act, as amended, commonly known as the Clean Water Act (the "Act"). Subsequent to the filing and service of the complaint, plaintiff Sierra Club sought to join this action as a named plaintiff by virtue of an amended complaint which was filed on July 20, 1992.

TOC owns and operates a hazardous waste incinerator in Roebuck, South Carolina, and as part of that facility, operates a wastewater treatment system. The South Carolina Department of Health and Environmental Control ("DHEC") authorized the facility to discharge treated wastewater into the North Tyger River in accordance with a National Pollutant Discharge Elimination System ("NPDES") permit issued on December 15, 1986. The NPDES permit was modified on December 14, 1989, and on July 23, 1990. Although the NPDES permit expired on December 31, 1991, TOC made a timely application for renewal of the NPDES permit and therefore continues to operate under the terms of the NPDES

permit, as modified, pending renewal. Plaintiffs allege that wastewater discharges by TOC violated and continue to violate the terms and conditions of TOC's NPDES permit.

FOE notified TOC by letter dated April 10, 1992, that it intended to file a citizens suit under § 505 of the Clean Water Act based upon TOC's violations of its permit limits. On June 9, 1992, three days before the sixty day notice period was to expire,[1] DHEC commenced a civil action in state court against TOC. The state civil action was based upon the same violations of permit limits as those alleged by Friends in its notice letter and complaint. The state civil action was settled and a consent order and decree was entered between DHEC and TOC on June 10, 1992. Friends commenced this suit on June 12, 1992.

The matter is now before the court upon four motions:

1) TOC's motion to strike the amended complaint, joining Sierra Club as a new plaintiff, and to strike all related pleadings for failing to comply to Rules 15 and 21, Fed. R. Civ. P. ;

2) TOC's motion to dismiss pursuant to Rule 12(b)(1), Fed. R. Civ. P. , all claims brought by CLEAN and Sierra Club for lack of subject matter jurisdiction due to their failure to provide the statutorily required sixty-day notice of intent to file suit; and

3) TOC's motion to dismiss for failing to state a claim for which relief can be granted, upon the grounds that this action is precluded by the state court action brought by DHEC against TOC.

---

[1] Before a citizens suit can be brought under the Clean Water Act, notice of alleged permit violations must be provided to the alleged violator, DHEC and the EPA. 33 U. S. C. § 1365(b).

4) Plaintiffs' motion for a preliminary injunction to enjoin TOC from violating its NPDES permit.

The court conducted a hearing on all four motions at the University of South Carolina School of Law on November 19, 1992. At the conclusion of the hearing, the court took all four motions under advisement and scheduled a visit to the Roebuck hazardous waste incinerator. The court, along with representatives of both parties, conducted its tour of the incinerator on December 3, 1992.

TOC's Motion To Strike Pursuant to Rule 21 Because Of A Defective Amendment To The Complaint

This action was initially filed by two plaintiffs, FOE and CLEAN. Thereafter, an amended complaint was filed purporting to add the Sierra Club as a third plaintiff. The amendment was made pursuant to Fed. R. Civ. P. 15(a), which generally provides that a party may amend, as a matter of right, at any time before a responsive pleading is served. After the complaint was filed, TOC filed its motion to strike, which is technically not a "responsive pleading. " *Smith v. Blackledge*, 451 F. 2d 1201, 1203 n. 2 (4th Cir. 1971). Therefore, plaintiffs sought to act pursuant to Rule 15(a) when they amended the complaint to add the Sierra Club. However, the more liberal requirements of Rule 15 clearly conflict with the requirements of Fed. R. Civ. P. 21, regarding joinder of additional parties. Rule 21 provides for the addition of parties "*by order of the court* on motion of any party or of its own initiative. " Fed. R. Civ. P. 21 (emphasis added). Several courts, including the Fourth Circuit, have held that Rule 21 is controlling when there exists a conflict between Rule 21 and 15. *See Age of Majority Educational Corp. v. Preller*, 512 F. 2d 1241 (4th Cir. 1975); *see also* 6 Charles

A. Wright, ET AL., *Federal Practice and Procedure* § 1479, at 570 (1990). Accordingly, Rule 21 applies and therefore the effort to join Sierra Club as a co-plaintiff, without first securing the approval of the court, was inappropriate. At oral argument, the court indicated its tentative conclusion on this issue, and invited the parties to orally move to join the Sierra Club pursuant to Rule 21. The two remaining plaintiffs promptly made such a motion which was granted by the court. Therefore, although the court agrees with TOC that the earlier amendment was invalid, the court hereby grants the motion of FOE and CLEAN to add the Sierra Club as an additional plaintiff.

TOC's Motion To Dismiss Pursuant To Rule 12(b)(1) For Lack Of Subject Matter Jurisdiction

TOC moves to dismiss all claims brought by CLEAN and Sierra Club for lack of subject matter jurisdiction. Specifically, TOC points out that FOE was the only one of the three plaintiffs to formally notify TOC of its intention to file suit after the expiration of sixty days. CLEAN and the Sierra Club did not join in the letter. Compliance with the notice requirement of § 505(b) is a jurisdictional prerequisite to bringing suit. *See National Environmental Foundation v. ABC Rail Corp.*, 926 F. 2d 1096, 1097-98 (11th Cir. 1991). The court is thus presented with the question of whether the sixty day notice requirement of the Clean Water Act requires that *each* individual plaintiff separately provide written notice before joining in an action.

This issue was directly addressed by this court in *South Carolina Wildlife Federation v. Alexander*, 457 F. Supp. 118, 124 (D. S. C. 1978), which held that notice provided by one of several plaintiffs constituted substantial compliance with the Clean Water Act. Judge Chapman reasoned that since the

omission of some of the plaintiffs from the notice "would in no way fail to put the defendants on notice as to the nature of the suit or the basis on which it was to be brought . . . defendants have not been prejudiced by this omission . . . ." *Id.* at 123-24. Other district courts have followed Judge Chapman's decision. *See Student Public Interest Research Group v. AT&T Bell Laboratories*, 617 F. Supp. 1190, 1194 (D. N. J. 1986); *Student Public Interest Group v. Tenneco Polymers, Inc.*, 602 F. Supp. 1394, 1396 (D. N. J. 1985).

As in *Alexander*, the defendant can show no prejudice resulting from the failure of CLEAN and the Sierra Club to join in the sixty day notice letter. The claims brought by all three plaintiffs in their complaint are exactly the same claims predicted in the notice letter. Finding no prejudice to the defendant, the court denies the motion to dismiss.

TOC's Motion To Dismiss Pursuant To Rule 12(b)(6) Because Of The Earlier DHEC Civil Action

The Clean Water Act makes unlawful the discharge of any pollutant into navigable waters except pursuant to a permit system established by the Act. 33 U. S. C. § 1311. Section 402(a) of the Clean Water Act, 33 U. S. C. § 1342(a), provides that the EPA may issue NPDES permits authorizing effluent discharges of pollutants into navigable waters. Section 402(a) further provides that effluent discharges shall be specified in the NPDES permit. Section 402(b) allows each state to develop and administer its own NPDES permit program provided the program meets federal requirements. DHEC is the South Carolina agency which administers the NPDES permit program.

Section 505(a) of the Act, 33 U. S. C. § 1365(a), authorizes citizens to commence civil actions against alleged violators of NPDES permits subject, however, to certain

limitations. Before the citizen suit can be commenced, the citizen, here FOE, must give notice of the violations to the alleged violator, DHEC, and the EPA. The citizen suit may then be filed no sooner than 60 days after such notice has been given. 33 U. S. C. § 1365(b). However, a citizen suit may not be commenced if DHEC "has commenced and is diligently prosecuting a civil or criminal action" in a state court "to require compliance with the standard,limitation, or order. " 33 U. S. C. § 1365(b)(1)(B).

In the present case, TOC's position is that DHEC's civil action commenced on June 9, 1992, which resulted in a consent order filed the next day, on June 10, 1992, precludes this suit, which FOE filed on June 12, 1992. In support of their argument, TOC cites *Gwaltney v. Chesapeake Bay Foundation, Inc.* 484 U. S. 49, 60 (1987), in which the Supreme Court explained that under the Act, citizen suits were intended to supplement rather than to supplant government action and that citizen suits are proper only "if the Federal, State, and local agencies fail to exercise their enforcement responsibility. " The *Gwaltney* Court further noted that the 60-day notice period was designed to enable governmental agencies to respond by initiating actions against the alleged polluter. "If the . . . State commences enforcement action within that 60-day period, the citizen suit is barred, presumably because governmental action has rendered it unnecessary. " 484 U. S. at 59.

TOC also argues that public policy considerations weigh in favor of barring citizen suits once a governmental agency brings an action to force compliance with the Act. TOC asserts that the most significant deleterious impact of allowing citizen suits to proceed concurrently or subsequent to governmental action is that allowing citizens dissatisfied with the terms of a settlement between an alleged polluter and a governmental agency to institute a citizen suit any time after

settlement would undermine agency authority to regulate water pollution. Therefore, TOC argues that an alleged polluter's incentive to settle would be greatly diminished. TOC further argues that to allow citizen suits in such situations would expose alleged polluters to duplicative prosecutions for the same violations and potentially to conflicting court orders to enforce the same NPDES permit limits.

It appears that the critical determination with regard to this issue is whether DHEC "diligently prosecuted" its enforcement action against TOC. Defendant reads the diligent prosecution provision of section 505(b)(1)(B) of the Clean Water Act as not applicable in situations such as the one presented here, where the government commences an action within the 60-day notice period and prior to the commencement of a citizen suit. However, this seems to be a rather tortured reading of the statute. Instead, plaintiffs' interpretation of this section makes more sense: the government's lawsuit must meet two conditions in order to bar a citizen suit; it must be commenced before the citizen suit is filed and it must be (or have been) diligently prosecuted.

Thus, plaintiffs assert that DHEC's lawsuit brought during the 60-day notice period would bar plaintiff's suit only if it has been "diligently prosecuted." Plaintiffs assert that TOC's drafting of the DHEC complaint and consent order, the lenient penalties imposed for the NPDES permit violations, and the swift settlement of the DHEC action demonstrate a lack of diligent prosecution.

Defendant counters that DHEC did diligently prosecute its action. TOC points out that the enforcement action against TOC began some three to four months before DHEC's complaint was filed. TOC further asserts that the consent order eventually entered into between DHEC and TOC was the result of three to four days of intensive negotiations. TOC also takes issue with the plaintiffs assertion that the $100,000

penalty imposed is lenient.

The court will deny TOC's motion to dismiss grounded upon the assertion that the DHEC litigation precludes this suit. Although the parties take contrasting positions on the validity of the DHEC prosecution, DHEC representatives were noticeably absent from the oral argument held on December 2. It appears to the court that factual issues must be resolved to determine whether DHEC "diligently prosecuted" its action against TOC before the court can decide whether the DHEC action bars plaintiffs' suit. A determination of this factual question will necessarily involve some of the same factual issues that will be presented if and when this case is heard on its merits. The court will thus be faced with the question of whether to conduct a separate evidentiary hearing on the issue of whether DHEC diligently prosecuted the state court action or whether such a determination should be made in the context of an overall determination of this action on its merits. The parties are invited to file submissions with the court setting forth their positions as to whether a separate evidentiary hearing on this one issue is appropriate. Factors which should be addressed in any such submissions should include, but are not limited to, the burden and expense of separate hearings on the litigants and the conservation of judicial resources.

Plaintiffs' Motion For A Preliminary Injunction

The four-factor standard for a preliminary injunction is well established in this circuit. The court must examine:

1) the likelihood of irreparable harm to the movant if the preliminary injunction is denied,

2) the likelihood of irreparable harm to the non-movant if the requested relief is granted,

3) the likelihood that the movant will succeed on the merits, and

4) the public interest.

National Resources Defense Council v. Watkins, 954 F. 2d 974, 981 (4th Cir. 1992). The court will address these issues seriatim.

1) The Likelihood Of Irreparable Harm To The Plaintiffs

In attempting to carry the burden of showing irreparable harm, the plaintiffs rely on affidavits of individuals who live [illegible] the river and further point to the alleged permit violations as themselves evidence of irreparable injury. The court has carefully reviewed the affidavits of the individuals who live on or near the river in question and find that they do not establish irreparable injury.

As to the second proposition, even if this court assumes for purposes of argument that violations have occurred and are continuing to occur, these violations alone do not necessarily mean that plaintiffs are entitled to a preliminary injunction. The Supreme Court cases of *Weinberger v. Romero-Barcelo*, 456 U. S. 305 (1982), and *Amoco Production Co. v. Village of Gambell, Alaska*, 480 U. S. 531 (1987) hold that procedural or technical violations of the Clean Water Act will not support an injunction. The best illustration of this point is the case cited by plaintiffs for the appropriate standard for a preliminary injunction, *Natural Resources Defense Council, Inc. v. Watkins*, 954 F. 2d 974 (4th Cir. 1992). If plaintiffs could rely solely on the existence of permit violations, there would be no need for *Watkins* articulation and application of a four-part standard of plaintiffs' burden of proof.

Significantly, in *Watkins*, the NRDC actually presented an expert affidavit on the issue of environmental harm. The

court found the affidavit sufficient to raise a factual issue on the question of standing, but "far from sufficient to prove the existence of irreparable environmental damage. " *Id.* at 983.

In contrast to plaintiffs' failure to offer evidence of environmental harm, TOC offers the affidavit of Michael W. Marlowe, summarizing evidence TOC has assembled to show that TOC's emissions have not caused harm to the environment. Pursuant to the June 10, 1992 Consent Order, TOC, through RMT, Inc. , conducted an investigation of mercury levels in fish tissues for the North and Middle Tyger Rivers in Spartanburg County. Aff. of Marlowe, ¶4. The investigation was conducted according to a workplan reviewed and approved by DHEC. Aff. of Marlowe, ¶4. The report concluded there was no significant difference in the mercury concentration in fish tissues collected above and downstream of TOC's discharge location. Aff. of Marlowe, ¶4.

TOC has also conducted, through Shealy Environmental Consultants, Inc. , 96-hour flow-through bioassays on TOC's plant which indicated that the effluent was not acutely toxic to the fish tested. Aff. of Marlowe, ¶5. Moreover, Shealy has performed aquatic macroinvertebrate assessments of the North Tyger River and determined that the effluent is having little or no toxic effect on the aquatic macroinvertebrate community. Aff. of Marlowe, ¶6.

Therefore, as in *Watkins*, plaintiffs have failed to offer sufficient evidence while TOC has offered contrary evidence on the issue of irreparable harm to plaintiffs. Accordingly, plaintiffs have, at this juncture at least, failed to carry their burden of showing irreparable harm.

2. Likelihood Of Irreparable Harm To The Defendant

Plaintiffs contend that TOC would suffer only economic harm which would not be overwhelming to TOC if

the injunction is improperly granted. TOC counters that it has spent over $900,000 in an effort to improve its compliance with its permit. Conceding that "a few" problems need to be resolved, TOC contends, in its brief, that an injunction at this stage would likely force the facility to close. However, at oral argument, when afforded the opportunity to present sworn testimony over the possibility of plant closure in the event of an injunction, TOC declined to offer such testimony. Thus, the court does not accept TOC's assertion that it would be forced to close its doors if the injunction were to be granted. The court does recognize, however, a degree of economic harm, which may be insignificant in terms of TOC's overall financial base, which would inure to TOC if injunctive relief were granted. Accordingly, this factor does not militate strongly against the award of an injunction.

3. Likelihood Of Success On The Merits

Plaintiffs, pointing to what they contend to be undisputed permit violations which continue to occur, confidentially predict that they "will almost certainly succeed on the merits."

Defendants cling fast to their position that the DHEC litigation forecloses any citizens suit such as this, and that the defendants will certainly prevail on the merits. The court is of the opinion that both sides have overstated the strength of their respective positions. As noted above, permit violations alone may not be sufficient to entitle the plaintiffs to the injunctive relief they seek. Additionally, the fact that DHEC has filed suit and settled that same action the next day does not necessarily mean this action is barred if this court later determines that the DHEC action was not diligently prosecuted.

Accordingly, the court finds that neither party has made a substantial showing of likelihood of success on the merits, the

evidence to this point being in equipoise. Accordingly, since plaintiffs fail to carry their burden, this factor militates against the award of injunctive relief.

4. The Public Interest

The plaintiffs contend that the public interest in a clean environment is paramount. The defendants counter that the plaintiffs cannot rely on this interest when they have presented no evidence of no real environmental harm, as noted above. Defendant contend that the public interest in a clean environment does not extend to the unreasonable degree of making all other economic interests subservient to plaintiffs' desire for a clean environment. Defendant further contend that there is an additional public interest which must be considered - the interest in governmental enforcement of environmental policy over multiple private actions seeking enforcement by citizens. Finally, TOC contends that there is a public interest in TOC's continued operation. TOC is a hazardous waste incinerator. As such, it performs a desirable societal function in treating and disposing of hazardous waste.

As noted above, the court is not prepared to accept TOC's contention that it will be forced to close if an injunction is granted. Accordingly, although the public definitely has an interest in the continued operation of the facility, TOC has been unable to show that this interest would be adversely affected by a preliminary injunction. All of the other public interests asserted by the parties appear to be legitimate and present in this case. However, as these public interests "cut both ways," plaintiffs have not made a sufficiently strong showing in regard to this factor, and thus this factor militates against the issuance of an injunction.

In summary, the plaintiffs have not come forward with a strong enough showing on the likelihood of irreparable

injury. Aside from increased operating costs, the defendant has not demonstrated substantial injury to itself if the injunction is granted. The likelihood of success on the merits is uncertain at this point, and the public has interests both favoring and denying an injunction. In light of the foregoing, the court is constrained to deny the motion for a preliminary injunction.

For the foregoing reasons, both of TOC's motions to dismiss, as well as its motion to strike, are denied. Plaintiffs' motion for a preliminary injunction is denied. Plaintiffs' motion, made orally at the hearing on November 19, to add the Sierra Club as a co-plaintiff is granted.

IT IS SO ORDERED.

Joseph F. Anderson, Jr.
United States District Judge

December 14, 1992
Columbia, South Carolina

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

FRIENDS OF THE EARTH, INC.)
ET AL)
)
PLAINTIFFS,)
)
VERSUS) C/A NO. 3:92-1697-17
)
LAIDLAW ENVIRONMENTAL SERVICES)
(TOC), INC.)
)
DEFENDANT)

BEFORE

THE HON. JOSEPH F. ANDERSON, JR.
U. S. DISTRICT JUDGE

COLUMBIA, S. C.
NOVEMBER 29, 1993

VOLUME V
TRANSCRIPT OF NON-JURY TRIAL

APPEARANCES

FOR THE PLAINTIFFS: BRUCE J. TERRIS, ESQ.
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FOR THE DEFENDANT: MICHAEL S. THWAITES, ESQ.
DONALD A. COCKRILL, ESQ.
KRISTOFER K. STRASSER, ESQ.
P. O. BOX 2757
GREENVILLE, S. C. 29602

AS LATE AS WE CAN CONVENIENT WITH YOUR OWN SCHEDULE, OF COURSE, SO WE DON'T END TOMORROW AND FIND THAT WE GOT ---

THE COURT: WE NEED TO PUT IN A FULL DAY TODAY, YES, SIR. WE WILL BE IN RECESS.

(LUNCHEON RECESS).

THE COURT: ALL RIGHT, I'M READY TO PROCEED. DID YOU HAVE ANY ADDITIONAL QUESTIONS OF THIS LAST WITNESS?

MR. THWAITES: NO, YOUR HONOR.

THE COURT: CALL YOUR NEXT WITNESS, PLEASE.

MR. COCKRILL: THE DEFENDANT WOULD CALL DR. SAM WHITE.

THE CLERK: PLEASE COME FORWARD TO BE SWORN.

SAM WHITE, SWORN

DIRECT EXAMINATION

BY MR. COCKRILL:

Q. DR. WHITE, WHAT IS YOUR WORK ADDRESS?

A. WORK ADDRESS IS WITH RMT IN GREENVILLE, SOUTH CAROLINA, IT'S 100 VRDAE BOULEVARD IN GREENVILLE.

Q. WHAT IS YOUR PRESENT JOB?

A. I'M THE PROGRAM MANAGER FOR WASTEWATER FOR RMT.

Q. AND WHAT IS RMT?

A. RMT IS A FULL SERVICE ENVIRONMENTAL CONSULTING ENGINEERING FIRM.

Q. AND THEY ARE LOCATED WHERE? GREENVILLE?

A. THE SOUTHEAST REGION OFFICE IS IN

[5-99]

GREENVILLE -- AM I NOT

[5-141]

Q. ON AN ONGOING BASIS? ARE THEY IN COMPLIANCE WITH THE PERMIT NOW, AS FAR AS YOU KNOW?

A. I WILL SAY IN SUBSTANTIAL COMPLIANCE.

Q. WHAT DO YOU MEAN --

A. THERE ARE -- I THINK OVER THE PAST YEAR THERE HAVE BEEN TWO OR THREE EXCURSIONS BEYOND THE 1. 3 THAT I'M AWARE OF.

Q. AND THAT'S IN THE PAST YEAR?

A. CORRECT.

Q. HAVE THEY TAKEN SPECIAL STEPS TO STAY IN COMPLIANCE?

A. YES. THEY HAVE. AT BOTH ENDS OF THE PLANT, AS WAS DISCUSSED IN EARLIER TESTIMONY THIS MORNING.

AT THE TAIL END OF THE PLANT THEY HAVE ADDED ON TWO OR THREE LEVELS OF TECHNOLOGY THAT DID NOT EXIST BEFORE. THAT WAS THE POINT OF DISCUSSION OF A NUMBER OF THE PILOT TESTS THAT WERE DONE RECENTLY, AND NOW THE PERMIT TO CONSTRUCT AND ACTUALLY THE INSTALLATION OF FILTERS, CARBON, ION EXCHANGE, ALL THOSE TECHNOLOGIES THAT WERE DISCUSSED. THAT'S ON THE TAIL END OF THE PLANT. THOSE ARE THE STEPS THEY HAVE TAKEN OVER AND ABOVE WHAT IS TYPICALLY DONE BY ANYBODY -- THOSE ARE ALL TERTIARY TREATMENT -- ADVANCED WASTE TREATMENT TECHNOLOGY, TYPICALLY ONLY ONE OF WHICH IS SELECTED AND INSTALLED AT A LOCATION. THAT'S ON THE TAIL END.

[5-141]

ON THE FRONT END OF THE PLANT I UNDERSTAND THAT THEY HAVE RESTRICTED THE LOAD OF MERCURY THAT IS ALLOWED TO BE BLENDED AND INTRODUCED INTO THE INCINERATOR, SEVERELY

[5-142]

RESTRICTED BEYOND WHAT THEY OTHERWISE WOULD BE ALLOWED TO PUT INTO THE INCINERATOR.

Q. DOES LAIDLAW HAVE AN ALLOWABLE LIMIT OF MERCURY THAT THEY CAN FEED INTO THE WASTEWATER OR INCINERATE ON A DAILY BASIS?

A. YES, THERE IS A RCRA LIMITATION THAT I CANNOT CITE THE POUNDS PER DAY ON MERCURY, BUT THERE IS A LIMITATION --

Q. AND RCRA IS R-C-R-A, ALL CAPS, CORRECT?

A. EXACTLY.

Q. WHAT IS THAT? YOU DON'T HAVE TO GIVE US THE FULL TITLE, IT'S FEDERAL LAW, THOUGH, RIGHT?

A. EXACTLY. IT'S THE HAZARDOUS WASTE MANAGEMENT REGULATIONS.

Q. SO, UNDER RCRA THEY HAVE SOME NUMBER OF POUNDS THAT THEY ARE ALLOWED TO INCINERATE ON A DAILY BASIS; IS THAT CORRECT?

A. THAT'S CORRECT.

Q. AND ARE THEY INCINERATING THAT MUCH?

A. NO. THE RECORDS SHOW THAT FOR THE -- FOR THE PAST YEAR, AT LEAST THE PAST YEAR IN QUESTION WHERE I CITED THERE MAY HAVE BEEN TWO TO THREE VIOLATIONS OR EXCEEDANCES OF

[5-142]

THE 1. 3 PARTS PER BILLION LEVEL. IN THAT SAME YEAR. JUST ON A ROUGH AVERAGE, THEY HAVE BEEN INTRODUCING INTO THE INCINERATOR APPROXIMATELY TWO TEN-THOUSANDTHS -- THAT'S TEN-THOUSANDTHS.

Q. . 02 PERCENT?

A. EXACTLY. TWO TEN-THOUSANDTHS OF WHAT THEY ARE ALLOWED TO ENTER INTO THE INCINERATOR BY RCRA.

[5-143]

Q. IS IT YOUR UNDERSTANDING THEY ARE TURNING AWAY SOME BUSINESS IN ORDER TO STAY IN COMPLIANCE?

A. YES, THEY ARE.

MR. COCKRILL: THANK YOU, DR. WHITE.

THE COURT: WHY DON'T WE TAKE A MID AFTERNOON BREAK AT THIS POINT?

LET'S TAKE A 15 MINUTE RECESS.

(SHORT RECESS).

THE COURT: ALL RIGHT, YOU MAY CROSS EXAMINE THE WITNESS.

CROSS EXAMINATION

BY MR. TERRIS:

Q. DR. WHITE, GOOD AFTERNOON.

A. HELLO.

Q. I'M CORRECT, AM I NOT, THAT THE PURPOSE OF THE FISH STUDY WAS TO PERSUADE DHEC TO INCREASE THE MERCURY LIMIT?

A. TO PROVIDE THEM TECHNICAL JUSTIFICATION TO ALLOW THEM TO ESTABLISH A HIGHER MERCURY NPDES LIMIT. YES.

Q. THANK YOU. THE WORK PLAN FOR YOUR FISH TISSUE STUDY, IT PROVIDED THAT YOU

[5-143]

WOULD USE THE HIGHEST TROPHIC LEVEL ORGANISM COMMON TO ALL THREE SITES; ISN'T THAT RIGHT?

A. CORRECT. THE HIGHEST TROPHIC LEVEL COMMON TO ALL THREE AND AVAILABLE IN SUFFICIENT NUMBERS TO DO WHAT WE SAID WE WERE GOING TO DO WITH THE STUDY.

Q. WHAT I GAVE YOU WAS AN ACTUAL QUOTE, THAT IT WAS -- IT'S

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG)

South Carolina Department of Health and Environmental Control,

Plaintiff,

v.

Laidlaw Environmental Services (TOC), Inc.,

Defendant.

COMPLAINT
92-CP-42-1429

INTRODUCTION

1. This action is brought to enforce compliance with the terms of a National Pollutant Discharge Elimination System ("NPDES") permit issues to the Defendant pursuant to the South Carolina Pollution Control Act, S. C. Code Ann. §§ 48-1-10 *et seq.*

JURISDICTION

2. This Court has jurisdiction over this action pursuant to S. C. Code Ann. § 15-7-30.

PARTIES

3. Plaintiff, Department of Health and Environmental Control ("DHEC"), is an agency of the State of South Carolina with responsibility for implementing the South Carolina Pollution Control Act, S. C. Code Ann. §§ 48-1-10 *et seq.* , and the NPDES Permit Regulations , 24 S. C. Code Ann. Regs. 61-9. Plaintiff is empowered to bring this action pursuant to § 48-1-50(4) of the South Carolina Pollution Control Act.

4. Defendant, Laidlaw Environmental Services

(TOC), Inc. ("TOC"), a corporation doing business in the State of South Carolina, operates a hazardous waste incinerator located at 301 Railroad Street, Roebuck, Spartanburg County, South Carolina.

FACTUAL BACKGROUND

5. TOC owns and operates a wastewater treatment system as part of its Roebuck facility.

6. The facility is authorized to discharge treated wastewater into the North Tyger River in accordance with the provisions contained in NPDES permit No. SC0040517 issued by DHEC on December 15, 1986. The NPDES permit was modified on December 14, 1989, and again on July 23, 1990.

7. The NPDES permit was scheduled to expire on December 31, 1991. On June 28, 1991, Defendant applied to renew its permit.

8. By letter dated July 1, 1991, Plaintiff acknowledged receipt of Defendant's application of renewal of its NPDES permit. Plaintiff's letter also states that Defendant's permit SC0040517 will remain fully effective and enforceable pending issuance of the new permit. Defendant therefore continues to operate under the terms of NPDES permit SC0040517 issued December 15, 1986 and modified December 14, 1989 and July 23, 1990.

9. Part I. A and Part III. A. 7 in the NPDES permit establish, in part, effluent parameters and limitations allowable for Defendant's treated wastewater discharge.

10. The NPDES permit issued to Defendant requires monitoring and the submittal of Discharge Monitoring Reports ("DMRs") and Noncompliance Reports to Plaintiff.

11. On September 7, 1988, Consent Order 88-47-W was executed by the Commissioner of DHEC which required Defendant to initiate corrective measures related to its

wastewater treatment system because DMRs submitted by the Defendant revealed that the treated wastewater discharge did not consistently achieve compliance with limitations in the NPDES permit. The Consent Order also assessed a civil penalty of $20,000. 00. This Consent Order administratively expired on March 15, 1991.

12. Despite Defendant's efforts to control discharges. Plaintiff has determined that DMRs submitted by Defendant demonstrate that the discharge of pollutants in excess of applicable effluent limitations has continued since April, 1991.

CAUSE OF ACTION

13. The South Carolina Pollution Control Act prohibits the discharge of pollutants except as in compliance with provisions of a permit.

14. Defendant has failed to consistently comply with the terms of its NPDES permit, thereby violating the permit and the South Carolina Pollution Control Act.

15. Plaintiff is aware that Defendant has made significant efforts to control the variability of certain constituents in its treated wastewater discharge; however, compliance with certain parameters in Defendant's NPDES permit have not been consistently achieved.

CLAIM FOR RELIEF

WHEREFORE, Plaintiff prays for the following relief:

16. That the Court order Defendant to comply with the terms and conditions of its NPDES permit and the South Carolina Pollution Control Act.

17. That the Court issue an injunction ordering

Defendant to install additional pollution control equipment and/or make modifications to its wastewater treatment system in order to meet applicable effluent limitations.

18. That the Court impose civil penalties for the above-stated violations in an amount to be established taking into account the following factors:

a. The seriousness of the violation;
b. The economic benefit (if any) resulting from the violation;
c. The history of such violations;
d. Defendant's good faith efforts to comply with the requirements;
e. The economic impact of the penalty on Defendant; and
f. Such other matters as justice may require.

Dated this 9th day of June, 1992.

Respectfully submitted,

By: _____

William A. Ready
Staff Attorney

Walton J. McLeod, II
General Counsel

South Carolina Department of Health
and Environmental Control
2600 Bull Street
Columbia, South Carolina 29201
(803) 734-4910

[CERTIFICATE OF SERVICE OMITTED IN PRINTING]

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG)

South Carolina Department of Health and Environmental Control,

Plaintiff,

v.

Laidlaw Environmental Services (TOC), Inc.,

Defendant.

CONSENT ORDER AND DECREE

WHEREAS, the Plaintiff, South Carolina Department of Health and Environmental Control ("Department"), previously filed a complaint in this Court against Defendant, Laidlaw Environmental Services (TOC), Inc. ("TOC"), alleging violations of National Pollutant Discharge Elimination System ("NPDES") permit No. SC0040517 and the South Carolina Pollution Control Act;

WHEREAS, Plaintiff and Defendant agree that settlement of these matters is in the best interest of the parties and the public, and that entry of this Consent Order and Decree ("Consent Order") without additional litigation is the most appropriate means of resolving this action;

WHEREAS, Plaintiff and Defendant, by their authorized counsel and without trial or final adjudication of the issues of fact or law with respect to Plaintiff's claims or allegations, consent to the entry of this Consent Order to avoid further litigation and to resolve the controversy between them;

WHEREAS, Plaintiff and Defendant stipulate that this Court has jurisdiction of the parties and the subject matter involved in this action;

WHEREAS, Section 48-1-50 of the South Carolina Pollution Control Act, S. C. Code of Laws, Section 48-1-50, enumerates the powers of Plaintiff and specifies that Plaintiff

has the authority to make, revoke, or modify orders, and administer penalties for violation of the code, any order, permit, regulation, or standard;

WHEREAS, Plaintiff has considered all the allegations raised in the pleading and the actions of Defendant, including Defendant's cooperation with Plaintiff and Defendant's voluntary actions and efforts in the area of environmental compliance, and believes the remedies required by this Consent Order are appropriate and just; and

WHEREAS, Plaintiff recognizes that persistent efforts have been made by Defendant, at considerable expense, to evaluate and control the discharge of pollutants in excess of current effluent limitations. Among the efforts made by Defendant are:

March-June 1989	Made numerous contacts with Department personnel regarding boiler blowdown, wastewater, and flow-through test.
June 1989 - March 1991	Three trial studies to determine the appropriate treatment system. All data, progress reports, engineering assessments, and construction progress reports were submitted to the Department, which concurred with the selection of the treatment technology.
March 1991	Metals removal system upgrade made to the wastewater treatment system at a cost of

	approximately $920,000 which incorporated Best Available Technology for removal of metals.
March 1991	Onsite office was established for full-time Department inspector who reviews all monitoring records.
April 1991	Meeting with Department to discuss metals system removal upgrade and mercury analysis and removal.
May 1991	Submittal of request to add iron sulfate to wastewater treatment system. (Department granted request.)
June 1991	Letter to Department requesting relief from the permitted limit for mercury in accordance with the permit. (The limit for mercury was decreased by the Department in 1987 to its present level.)
June 1991	Submittal of the first semi-annual macroinvertebrate assessment of the North Tyger River for 1991. (Assessment indicates that wastewater discharge from the facility is

	not impacting the receiving stream.)
July 1991	Department internal memorandum agreeing that the final effluent discharge from TOC has little impact on the macroinvertebrate communities of the North Tyger River.
August 1991	Replacement of faulty seals in the absorption filters.
September 1991	Meeting with Department to update efforts made and findings reached regarding mercury levels in effluent.
September 1991	Conceptual proposal submitted for site specific permit effluent limit.
October 1991	Department internal memorandum stating that conceptual proposal for site specific permit effluent limit is generally a reasonable approach.
December 1991	Second semi-annual macroinvertebrate assessment of the North Tyger River for 1991 indicates that the facility's wastewater discharge is not

impacting the receiving stream.

January 1992	Additional telephone conversations with Department concerning abnormal mercury excursions. Department indicated it believed TOC was doing all it could to rectify the abnormal mercury excursions.
February 1992	Final proposal submitted for a site specific permit effluent limit. Comments by Department were addressed.
May 1992	Submittal of work plan describing an investigation of mercury in fish tissue collected from the North and Middle Tyger Rivers. The study was approved by the Department and initiation of the study has begun.

NOW, THEREFORE, pursuant to Rule 41(a)(2) of the South Carolina Rules of Civil Procedure, without trial of any issue of fact or law, and without admission by Defendant of the facts or violations alleged in the complaint, and upon consent of the parties, and upon consideration of the mutual promises contained herein, it is herby ORDERED, ADJUDGED, AND DECREED as follows:

1. Plaintiff's Complaint against Defendant is hereby dismissed.

2. The undersigned representative for each party certifies that he/she is fully authorized by the party or parties whom he/she represents to enter into the terms and conditions of this Consent Order and to legally bind them to it.

3. This Consent Order shall apply to and be binding upon the parties and their employees, members, agents, successors, and assigns.

4. This Consent Order constitutes a full, fair, reasonable, and complete settlement of the allegations contained in the complaint filed in this case, and all other claims covered by this Consent Order, including all claims Plaintiff might have arising out of or in any way connected with alleged violations of NPDES Permit No. SC0040517, and is determined to be in the public interest and an appropriate resolution of the facts which generated Plaintiff's complaint.

5. This Consent Order shall not constitute the admission or evidence of any wrongdoing or misconduct or liability on the part of Defendant. Nothing in this Consent Order shall preclude or impair in any manner any agreements, defenses, or arguments that might be raised by Defendant in any other proceeding.

6. During the time period indicated above, numerous communications, including telephone conferences, written correspondence, and meetings, have occurred between Plaintiff and Defendant pertaining to efforts being made by Defendant regarding operation and/or upgrades to Defendant's wastewater treatment system.

7. Defendant shall complete the fish tissue study for mercury by August 1, 1992.

8. Within 60 days from the fish tissue study for mercury, as described in paragraph number 7, Defendant shall meet with Plaintiff to determine if a different effluent limitation for mercury is justified and, if so, to initiate the proper steps to modify the discharge permit.

9. Defendant shall ensure that the analyses are performed on the same normal work day (Monday through Friday unless a holiday) that a sample is collected unless prior approval is obtained by Defendant from Plaintiff.

10. Defendant shall use every effort, to include but not limited to the adjustment of the mercury-containing waste feed rate, to achieve compliance with the limitation for mercury in its permit and, depending upon any change in the limitation resulting from the fish tissue study, shall submit to the Plaintiff for approval additional plans to meet the limitation for mercury.

11. In the event the Defendant discharges a pollutant in an amount greater than 10 times the permitted limitation, such discharge shall be reported to the Plaintiff within 24 hours thereof.

12. For all permit violations which have occurred up to the date of execution of this Consent Order, Defendant shall pay to Plaintiff within thirty (30) days of receipt of this fully executed Consent Order a civil penalty in the amount of $100,000.

13. Failure by Defendant to comply with the terms and conditions of this Consent Order shall constitute a violation of the Pollution Control Act and shall subject Defendant to additional enforcement action.

14. The sums to be paid under the terms of this Consent Order shall constitute full settlement and shall completely discharge Defendant from any and all liability under the South Carolina Pollution Control Act, S. C. Code Ann. 48-1-10 *et seq.* , or any other provisions of law arising from (a) any and all discharges by Defendant which exceed the limits set in its NPDES permit on or before the date this Consent Order is approved and entered by the Court, (b) the violations alleged in the Complaint, and (c) any and all violations occurring during the period covered by this Consent

Order.

15. This Consent Order shall automatically terminate and expire if and when Defendant achieves compliance with any new permit limit based on paragraph number 8 above or upon submittal of the additional plans, if necessary, and achieve the limitations for mercury referred to in paragraph 10 above.

SO ORDERED by the Court of Common Pleas on this 10th day of June, 1992.

_____
Judge

AGREED:

_____ By: _____
Date William A. Ready
Staff Attorney

Walton J. McLeod, II
General Counsel

South Carolina Department of Health
and Environmental Control
2600 Bull Street
Columbia, South Carolina 29201
(803) 734-4910

_____ By: _____
Date Michael S. Thwaites
Phillip L. Conner
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Services (TOC), Inc.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Friends or the Earth, Inc.; Citizens Local Environmental Action Network, Inc.; and Sierra Club, Plaintiffs, v. Laidlaw Environmental Services (TOC), Inc., Defendant.	C/A No.: 3:92-1697-17 FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

I. INTRODUCTION

Laidlaw Environmental Services (TOC), Inc. ("Laidlaw"), owns and operates a hazardous waste incinerator in Roebuck, South Carolina. As part of that facility, Laidlaw maintains a wastewater treatment plant for water used in the incineration process. Laidlaw discharges the treated wastewater into the North Tyger River pursuant to a National Pollutant Discharge Elimination System ("NPDES") permit issued by the South Carolina Department of Health and Environmental Control ("DHEC").

Plaintiffs Friends of the Earth ("FOE") and Citizens Local Environmental Action Network, Inc. ("CLEAN")[1] brought this action on June 12, 1992 against Laidlaw pursuant to the citizen suit provision in section 505 of the Federal Water Pollution Control Act Amendments of 1972, commonly known as the Clean Water Act, 33 U.S.C. § 1365. The Plaintiffs seek to enforce Laidlaw's NPDES permit and request declaratory and injunctive relief, the imposition or civil penalties, and the

[1]At the November 19, 1992 hearing in this action, the court granted the Plaintiffs' oral motion to join the Sierra Club as an additional plaintiff pursuant to Fed. R. Civ. P. 21.

award of costs, including attorneys' fees and expert witness fees.

On July 1, 1992, the Defendant moved to dismiss the Plaintiffs' action, arguing that their citizen suit is barred by section 505(b)(1)(B) of the Act, 33 U.S.C. § 1365 (b)(1)(B), because DHEC had previously brought, and settled, a lawsuit against Laidlaw for the same alleged violations of its permit. The Plaintiffs responded by arguing that DHEC's lawsuit did not preclude the citizen suit because, *inter alia*, DHEC did not "diligently prosecute" its action against Laidlaw. The court heard oral argument on the Defendant's motion to dismiss at the University of South Carolina School of Law on November 19, 1992.

In its order of December 14, 1992, the court denied the Defendant's motion to dismiss, but ruled that the determination of whether DHEC's action constituted diligent prosecution sufficient to bar the Plaintiffs' citizen suit involved disputed factual matters. Accordingly, the court decided to conduct a separate evidentiary hearing on the preliminary issue of whether the Plaintiffs' citizen suit could proceed. The court received a total of seven days of testimony on this matter in October, November, and December of 1993. Thereafter, the court requested the United States Department of Justice to file a brief as *amicus curiae* setting forth the position of the United States Environmental Protection Agency ("EPA") on the issues raised at the hearing. The Department of Justice submitted, on behalf of the United States, two *amicus* briefs that generally supported the Plaintiffs' position.

After receiving all of the testimony, argument, and memoranda from the parties, as well as the submissions from the Department of Justice as *amicus curiae*, and after studying the applicable law, the court makes the following findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52. To the extent that any of the following findings of fact constitute conclusions of law, they are adopted as such, and to the extent

that any conclusions of law constitute findings of fact, they are so adopted.

II. FINDINGS OF FACT

A. Parties

The Plaintiffs, FOE, CLEAN, and the Sierra Club, are non-profit corporations which bring this action on behalf of their members to protect their environmental, health, economic, recreational, and aesthetic interests in the quality of the North Tyger River and waters downstream.

The Defendant, Laidlaw, is a South Carolina corporation which owns and operates a hazardous waste incinerator (hereinafter "the facility") in Roebuck, Spartanburg County, South Carolina. As part of the facility, the Defendant operates a wastewater treatment plant to treat water used in the incineration process before discharging the wastewater into the North Tyger River.

B. Chronology of Laidlaw's Operation of Roebuck Facility

The Defendant purchased the facility from ABCO Industries, Inc. ("ABCO") in January 1986. During most of 1986, after it purchased the facility from ABCO, Laidlaw did not have its own NPDES wastewater discharge permit; rather, Laidlaw operated the facility temporarily under the permit that had been issued to ABCO. On December 15, 1986, pursuant to section 402 of the Clean Water Act, 33 U.S.C. § 1342, DHEC issued to Laidlaw NPDES permit number SC0040517, effective January 1, 1987, for the facility's wastewater treatment plant. The permit authorized the Defendant to discharge limited quantities of pollutants into the North Tyger River in accordance with the conditions set forth in the permit. The permit limited the Defendant's discharge of antimony,

arsenic, cadmium, chromium, copper, lead, mercury, nickel, total organic carbon, and zinc. The permit also limited the flow, temperature, and pH of the effluent from the Defendant's facility. In addition, the permit imposed on the Defendant several monitoring and reporting obligations, such as the requirement to maintain discharge monitoring reports ("DMRs") and laboratory reports.

Several of the effluent limits in Laidlaw's initial permit were more stringent than those under ABCO's permit. The most significant reduction was in the mercury limit, which DHEC proposed to reduce from 20 parts per billion ("ppb") under ABCO's permit to 1.3 ppb. Because Laidlaw's permit contained such a dramatic reduction in the mercury limit, DHEC imposed an interim mercury limit of 10 ppb from January 1, 1987 to December 31, 1987, which decreased to 1.3 ppb on January 1, 1988.[2]

In connection with the interim mercury limit, the permit directed Laidlaw to conduct feasibility studies to determine whether the 1.3 ppb limit could be achieved. In addition, DHEC allowed Laidlaw the option of requesting a higher, site-specific mercury limit upon completion of these feasibility

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[2]On June 28, 1992, the Defendant applied for renewal of its NPDES permit. DHEC issued to the Defendant a draft permit on June 29, 1992 proposing to lower the Defendant's mercury limit to 1.1 ppb. According to the Defendant, DHEC recalculated the 1.1 ppb limit to 1.25 ppb after the Defendant requested a reduction in the wastewater flow rate from 220,000 gallons per day to 207,000 gallons per day. On September 1, 1993, DHEC renewed the Defendant's NPDES permit and imposed an adjusted mercury limitation of 1.25 ppb.

The parties have informed the court that the Defendant appealed the 1.25 ppb mercury limit in the renewed permit and that DHEC agreed to several revised permit conditions. Specifically, DHEC's revisions included changing the Defendant's 1.25 ppb mercury limit from a daily maximum to a monthly average maximum and raising the Defendant's maximum mercury limitation to 10 ppb. The Plaintiffs have informed the court that they have requested an administrative hearing regarding DHEC's modifications to the Defendant's NPDES permit. This order does not address the impact, if any, that the revised mercury limit would have on the merits of the Plaintiffs' lawsuit.

studies.

Faced with a drastic reduction in the mercury limit, Laidlaw contracted with Environmental Technology Engineering, Inc. ("ETE"), an environmental consulting firm, in December 1986 to conduct an engineering feasibility study to determine the best technological approach to achieving the strict 1.3 ppb mercury limit. ETE initially evaluated eight possible technologies and narrowed the focus to two technologies--activated carbon and ion exchange--for bench and pilot scale testing. ETE tested these technologies between June and December 1987 and recommended the installation of a second carbon adsorption unit to be run in series with Laidlaw's existing carbon unit. When the Defendant's permit was issued in December 1986, the facility's wastewater treatment plant consisted of a neutralization system, a carbon adsorption filter, and a cooling system. In early 1988 the Defendant installed the second carbon adsorption unit. Because of ETE's recommendation that the second carbon unit should enable Laidlaw to meet the 1.3 ppb mercury limit, the Defendant chose not to exercise its option of requesting a higher mercury limit at that time.

Despite ETE's testing, the additional carbon unit did not allow the Defendant's facility consistently to achieve the 1.3 ppb mercury limit. The Defendant's continuing problem with mercury excursions came to a head in May 1988 after a fish kill on the North Tyger River downstream of Laidlaw's facility. DHEC investigated the incident and determined that the fish kill was caused by a pH upset at the Defendant's facility. Thereafter, DHEC initiated an administrative enforcement action, which culminated in a consent order with Laidlaw on September 7, 1988. The consent order required the Defendant to investigate treatment technologies that would enable it to comply with the pH limits in its permit. In addition, DHEC imposed on the Defendant a $20,000 penalty and required the Defendant to replace the killed fish.

In response to the September 1988 consent order, Laidlaw contracted with RMT, Inc., another environmental consulting firm, to reevaluate the facility's wastewater treatment system and to make recommendations for correcting the problems Laidlaw was continuing to have with mercury and other metals excursions. During the latter part of 1988, RMT investigated four conceptual approaches to treating the effluent from the Defendant's facility. In December 1988, RMT submitted a preliminary engineering report to DHEC recommending the testing of three metals removal systems, trade named Unipure, Lancy, and Mem Tek, each of which employed a different technology for metals removal. During 1989, Laidlaw and RMT conducted bench and pilot scale tests on these three wastewater treatment systems.

Also during 1989, Laidlaw applied for and received approval from DHEC to replace its two existing cooling towers with a single, more advanced cooling system. The new cooling system was necessary to eliminate occasional temperature excursions that the Defendant experienced during the summer months.

On December 28, 1989, Laidlaw submitted to DHEC the results of RMT's pilot testing. These results showed that, among the three systems tested, the Lancy system was the most likely to achieve the Defendant's NPDES permit limits for all metals, including mercury. As a result, Laidlaw selected the Lancy system and requested approval from DHEC for its installation. DHEC approved the Defendant's request and issued a construction permit on July 10, 1990.

During the latter half of 1990 and the first two months of 1991 the Lancy system was constructed and installed at the Defendant's facility. Between February and July 1991, the Defendant began full scale operation of the Lancy system.

The Lancy system brought the Defendant into compliance with the non-mercury metals limits in the Defendant's permit. However, at least by April 1991, it was

clear that the Lancy system would not enable the Defendant to comply with its mercury limit.

In responding to the continuing problems with mercury, the Defendant worked with DHEC and Lancy to make operational adjustments to the system in an effort to achieve compliance with the mercury limit. When it ultimately became apparent that mercury excursions were continuing to occur, the Defendant put pressure on the manufacturer of the Lancy system to correct the problem. Lancy responded by recommending numerous testing procedures, including the addition of varying amounts of iron sulfate, copper sulfate, and free sulfide. These tests were unsuccessful, however, in reducing the mercury content below the NPDES limit. Lancy thereafter determined that achieving the 1.3 ppb limit was problematic because it appeared that the level of metals being introduced to the wastewater treatment system was simply too low for the system to work effectively on mercury.

Because meeting the strict mercury limit continued to be problematic, on June 26, 1991, the Defendant filed with DHEC a request for a higher, site-specific limit for mercury. During the latter part of 1991, and continuing into the early part of 1992, Laidlaw both pursued its request for a higher mercury limit and continued to perform tests and otherwise investigate ways to achieve the 1.3 ppb limit. To support its request for a higher mercury limit, the Defendant commissioned a study of mercury levels in fish in the North Tyger River. DHEC found the Defendant's study to be inconclusive, however, and informed the Defendant that the study did not meet EPA criteria.

DHEC enforcement officials testified that they began to consider taking additional enforcement action in early 1992, after a series of abnormally high mercury violations at the Defendant's facility in December 1991. However, DHEC did not commence its enforcement action until May 1992.

On April 10, 1992, the Plaintiffs sent a letter to the Defendant, to the EPA, and to DHEC, informing them that the Plaintiffs intended to file a citizen suit against Laidlaw under section 505 of the Clean Water Act after sixty days, or on or after June 10, 1992.

DHEC initiated a formal enforcement action on May 21, 1992 by issuing to the Defendant a Notice of Enforcement Conference. The fact sheet attached to the Notice of Enforcement Conference stated that since April 1991 the Defendant had committed 225 violations of the mercury limit in its permit and two violations of the permit limit for antimony. DHEC was unaware of any violations of the Defendant's permit other than those set forth in the fact sheet. The violations set forth in the fact sheet were based on the monthly DMRs submitted by Laidlaw. DHEC was unaware of any violations of the monitoring or reporting requirements of the Defendant's permit.

On June 5, 1992, DHEC held an enforcement conference with the Defendant. Subsequent meetings and telephone conferences to negotiate a consent agreement occurred later in the day on June 5, 1992, as well as on June 8, 1992. The parties reached a final consent agreement on June 8, 1992. On June 9, 1992, the Defendant filed a judicial complaint in the Court of Common Pleas in Spartanburg County, South Carolina, on behalf of DHEC. On June 10, 1992, a state circuit judge approved the settlement of the DHEC lawsuit.

The Plaintiffs filed the instant lawsuit against Laidlaw on June 12, 1992. The Plaintiffs have compiled lists of the Defendant's alleged permit violations from the Defendant's DMRs and laboratory reports. The Plaintiffs allege that Laidlaw has had a long history of violations of its permit limits for metals and pH. According to the Plaintiffs, since the Defendant obtained its NPDES permit for the Roebuck facility it has committed at least 1,044 discharge violations, some of which allegedly continued until March 1993.

The Plaintiffs' lists of alleged violations show that the Defendant's most frequent violations have been of its limit for mercury. The Defendant's permit requires it to monitor for mercury every day that the incinerator is in operation. The Plaintiffs allege that the Defendant violated its mercury limit on almost a daily basis from early 1991 until June 18, 1992. The Plaintiffs also contend that the Defendant committed at least 31 discharge violations after the Consent Order with DHEC was entered. In addition, the Plaintiffs allege at least 676 violations of the permit's monitoring requirements and 615 violations of the permit's reporting requirements.

After the Consent Order with DHEC was entered, Laidlaw continued to explore additional technologies that might help to remedy the mercury problems. The Defendant experimented with various operational changes to the system and performed various tests utilizing chemicals and technologies both recommended by Laidlaw's consultants and developed internally by Laidlaw personnel. As the mercury problems continued to be investigated, the Defendant had to simply shut down the incinerator altogether for substantial periods of time in July, August, September, and November 1992, in an effort not to violate either its mercury parameter or the judicial consent order with DHEC.

The solution to meeting the 1.3 ppb limit was ultimately achieved by Laidlaw personnel through experimentation utilizing activated carbon, microfiltration, and ion exchange. The Defendant discovered that adding activated carbon filters at the end of the Lancy system effectively reduced the mercury level below 1.3 ppb, so long as the Defendant limited the feed rate of mercury-containing waste into the incinerator. The only problem encountered with this configuration occurred when the carbon adsorption filters were backwashed, as this procedure tended to release extremely fine particulates into the wastewater stream. Since any mercury-containing particulate would likely violate the 1.3 ppb limit, Laidlaw added both a

microfilter and an ion resin exchange unit after the carbon filters to remedy this problem. The addition of the new equipment, combined with the Lancy system and the other components of the wastewater treatment system, has enabled the Defendant consistently to achieve full compliance with all of the parameters contained in its NPDES permit.

Following an extended period of demonstrated full compliance, DHEC agreed to allow the judicial consent order to expire. DHEC so notified the state court in a letter dated August 6, 1993 from DHEC attorney William Ready.

C. DHEC's Judicial Enforcement Action

1. Decision to file judicial action

DHEC's original intent in prosecuting the Defendant for NPDES violations was to bring an administrative enforcement action against the Defendant. In fact, DHEC's usual approach in bringing a formal enforcement action is to issue a notice of enforcement conference and negotiate an administrative consent order. After receiving the Plaintiffs' sixty-day notice letter, however, Ralph Mellom, the Defendant's outside counsel, called Russell Sherer, Chief of DHEC's Bureau of Water Pollution Control, and inquired whether DHEC would consider filing an action in court against the Defendant. Sherer informed Mellom that DHEC had no interest in filing a judicial action instead of proceeding with an administrative action. Sherer stated, however, that DHEC would agree to file an action in court if the Defendant would expend any additional resources necessary to file a judicial action.

On June 5, 1992, following the DHEC enforcement conference, counsel for the Defendant telephoned DHEC and requested that the agency file a judicial action instead of proceeding with an administrative action. The Defendant's

reason for requesting that DHEC file a judicial action was to bar the Plaintiffs' proposed citizen suit in federal court. DHEC does not normally file judicial actions to enforce NPDES permits. Indeed, Sherer testified that DHEC had filed judicial actions in only two cases prior to filing the judicial action against the Defendant and that, in each of the previous cases, the defendant had requested that a judicial action be filed. Earl Hunter, the Director of the Division of Water Quality Assessment and Enforcement in DHEC's Bureau of Water Pollution Control, testified that if the Plaintiffs had not sent a sixty-day notice letter, DHEC probably would not have filed a judicial action. Since DHEC must go to court to enforce either an administrative order or a judicial consent decree, DHEC gains no advantage by filing a judicial action instead of proceeding with an administrative action. DHEC filed a judicial action against the Defendant solely because counsel for the Defendant requested that DHEC file a judicial action instead of an administrative action.

2. Procedural aspects of DHEC's judicial action

At the direction of Mellom, Phillip Connor, an associate with Mellom's law firm, drafted the initial version of the DHEC Complaint and of the Consent Order. On June 9, 1992, the sixtieth day after the Plaintiffs sent their sixty-day notice letter, Connor obtained the signatures from DHEC on the Complaint and Consent Order and signed the Consent Order for the Defendant. He then drove the Complaint and the Consent Order to the courthouse in Spartanburg, where he filed the Complaint and paid the filing fee for DHEC. He left the Consent Order in the judge's chambers, and the judge signed it the next day. The Consent Order was entered at 9:34 a.m. on June 10, 1992.

DHEC and the Defendant reached a settlement agreement pertaining to the DHEC lawsuit on Monday, June 8,

1992, just one business day after the initial enforcement conference. The time period from the enforcement conference to the final settlement agreement was, by DHEC's standards, "exceedingly fast." The usual time period from the date of the enforcement conference to the date of a consent order is thirty to forty-five days. Robert Knauss, the DHEC enforcement officer with responsibility for the Defendant's facility, testified that none of the cases in which he has been involved has moved as quickly to final settlement as DHEC's action against the Defendant. Similarly, William Krecker, the Section Manager of the Enforcement Division of DHEC's Bureau of Water Pollution Control, testified that, of the 100 to 200 enforcement cases he had been involved in, none has been resolved as quickly as DHEC's action against the Defendant. Hunter testified that the reason for the swiftness of the DHEC proceeding was the Defendant's request that DHEC file a judicial action and the deadline imposed by the Plaintiffs' sixty-day notice letter. Sherer testified in 1990, in another case, that citizen suits help bring about compliance and that DHEC's policy was not to file an action in court when requested to do so by a defendant in order to bar a citizen suit. DHEC's action in this case violates this policy.

3. Substantive aspects of Consent Order

DHEC initially sought a penalty of $120,000 from the Defendant. Knauss determined that DHEC would seek a penalty of $120,000, because that amount was consistent with past penalties obtained by DHEC. He testified that he determined in his head the amount of the penalty to seek from the Defendant and that he made no written record of how he arrived at the figure of $120,000. Both Hunter and Krecker approved the $120,000 penalty amount; however, neither of them personally involved himself in the computation of the penalty amount, each deferring to Knauss regarding the details

of the penalty proposal. Hunter and Krecker also approved the $100,000 penalty ultimately included in the Consent Order.

DHEC's uniform enforcement policy, which was approved by the DHEC board in December 1991, sets forth several factors that may be considered in the assessment of civil penalties, including "[e]conomic benefit as a result of noncompliance." DHEC, Uniform Enforcement Policy, at 3, ¶ 3(d) (Dec. 12, 1991) (Pl. Ex. 10). In addition, DHEC's Bureau of Water Pollution Control has a guidance document that recommends a penalty of $1,000 for each discharge violation. DHEC Bureau of Water Pollution Control, Penalty Assessment Guidance, at 4 (Pl. Ex. 92). This amount may be adjusted upward or downward depending on various mitigating factors, such as mechanical problems, vendor problems, or inability to pay. *Id.* at 4-5. No evidence has been presented that any of these mitigating factors applied in this case. If a penalty of $1,000 per violation had been imposed in this case, the penalty based on the number of violations listed in the fact sheet accompanying DHEC's Notice of Enforcement Conference would have been $227,000.

In considering the seriousness of a permittee's violations, DHEC uses the standard of whether the violations were more than 1.4 times the permit limit. Knauss was aware that most of the Defendant's mercury violations were greater than 1.4 times its permit limit for mercury. The DHEC penalty guidance and policy documents were available to enforcement staff at the time of the DHEC lawsuit.

DHEC made no attempt to calculate the Defendant's economic benefit from noncompliance. Krecker testified that he had no reason to believe that the Defendant had enjoyed any economic benefit and that economic benefit was not a factor in Knauss's consideration. Also, Hunter testified that Knauss considered, but did not calculate, economic benefit. However, no DHEC enforcement personnel obtained the information necessary to make an economic benefit calculation. DHEC did

not determine the capital costs or the operation and maintenance costs of the wastewater treatment equipment installed by the Defendant. According to Krecker, DHEC does not normally make an economic benefit calculation in proceedings to enforce NPDES permits.

Hunter testified that DHEC considers economic benefit in conjunction with good-faith attempts at compliance and that "economic benefit is usually derived from someone that just ignores environmental laws and doesn't want to place equipment in place." In this case, although the Defendant had been in violation of its permit for five years by the time DHEC brought it enforcement action in 1992, Krecker testified that he did not consider the Defendant to have obtained any significant economic benefit because the Defendant installed pollution control equipment with the intent of being in compliance. Since DHEC believed that the Defendant was attempting in good faith to comply with its permit, DHEC did not deem economic benefit to be an important consideration in calculating a penalty against the Defendant.

On June 9, 1992, DHEC and the Defendant entered into a Consent Order in which the Defendant agreed to pay a penalty of $100,000. The Consent Order contains no injunction requiring the Defendant to comply with its permit, but requires only that the Defendant make "every effort" to comply. Consent Order and Decree, at 5, ¶ 10 (June 9, 1992) (Def. Ex. 167). Also, the Consent Order provides that "[t]he sums to be paid under the terms or this Consent Order shall constitute full settlement and shall completely discharge Defendant from any and all liability . . . arising from . . . (c) any and all violations occurring during the period covered by this Consent Order." *Id.* at 6, ¶ 14. The Consent Order further provides that it "shall automatically terminate and expire if and when Defendant achieves compliance with any new permit limit based on number 8 above or upon submittal of the additional plans, if necessary, and achieve[s] the limits for mercury referred to in

paragraph 10 above." *Id.* at 6, ¶ 15.

Knauss testified that the Consent Order covered violations that occurred after the date it was entered. Krecker testified that DHEC's normal practice is that violations which occur after the date of a consent order are subject to additional enforcement action. He further testified that he is aware of only one case other than DHEC's case against the Defendant, in which DHEC's settlement covered future violations. In that case, however, the consent order provided for stipulated penalties for future violations. William Ready, DHEC's attorney who worked on this case, testified that it is not DHEC's practice to settle future violations "except on the basis of stipulated penalties." He also testified that DHEC attempted to include stipulated penalties in the Consent Order for permit violations that occurred after the Consent Order was entered, but did not insist them.

With the exception of Knauss, DHEC personnel testified that they did not interpret the Consent Order to cover permit violations that occurred after the date of the consent order. Ready testified that he believed that DHEC could seek penalties for violations occurring after the date of the Consent Order based on paragraph 10 of the Consent Order, which requires that the Defendant make "every effort" to comply with its mercury limit. However, Ready admitted that, if paragraphs 14 and 15 of the Consent Order were interpreted to settle violations occurring after the date of its entry but prior to its expiration, the Defendant would have obtained a benefit that is not extended to other dischargers in South Carolina.

The Consent Order also required the Defendant to complete a fish tissue study. However, before the Consent Order was entered, the Defendant was already planning to conduct the fish tissue study to support its request for a higher mercury limit. DHEC had no interest in having the Defendant perform the fish tissue study.

All of the foregoing factors provide some evidence that DHEC did not diligently prosecute its action against Laidlaw.

D. Economic Benefit of Noncompliance

The Defendant, as a holder of an NPDES discharge permit, should not profit from noncompliance with that permit. If DHEC assessed a penalty that was below the Defendant's economic benefit of noncompliance, DHEC would not have penalized the Defendant at all; instead, the Defendant would have been rewarded for noncompliance with its permit.

Economic benefit is the after-tax present value of avoided or delayed expenditures on necessary pollution control measures. Economic benefit represents the opportunity a polluter had to earn a return on funds that should have been spent to purchase, operate, and maintain appropriate pollution control devices. To determine a company's economic benefit from noncompliance with its permit, one must compare the company's cash flows associated with the delayed permit compliance measures to what those cash flows would have been if the company had obtained the necessary pollution control equipment on time.

EPA describes the nature of the economic benefit enjoyed by a firm that delays compliance with pollution control laws as follows:

> An organization's decision to comply with environmental regulations usually implies a commitment of financial resources; both initially, in the form of a capital investment or one-time expenditure, and over time, in the form of annual, continuing expenses. These expenditures might result in better protection of public health or environmental quality; however, they are unlikely to yield any direct economic benefit (i.e., net gain) to the organization. If

these financial resources were not used for compliance, they presumably would be invested in projects with an expected direct economic benefit to the organization. This concept of alternative investment; that is, the amount the violator would normally expect to make by not investing in pollution control, is the basis for calculating the economic benefit of noncompliance.

As part of the Civil Penalty Policy, EPA uses the Agency's penalty authority to remove or neutralize the economic incentive to violate environmental regulations. In the absence of enforcement and appropriate penalties, it is usually in the organization's best economic interest to delay the commitment of funds for compliance with environmental regulations and to avoid certain other associated costs, such as operating and maintenance expenses.

EPA, *BEN User's Manual* I-6 (July 1990) (Pl. Ex. 91).

Economic experts for both parties in this action testified that whether a permittee proceeded in good faith is irrelevant to economic benefit analysis. According to penalty guidelines promulgated by both the EPA and DHEC, good faith is a separate penalty factor to be considered when one determines what the appropriate civil penalty should be.

Present-value analysis of economic benefit allows one to express all cash flows as of a given date by accounting for the time value of money--i.e., the fact that a dollar today is worth more than a dollar tomorrow. To determine by how much the value of a dollar of one year exceeds the value of a dollar of another year, one must use a discount rate to calculate the present value of money from the various time periods. The discount rate, or "opportunity cost," represents the return the Defendant had the opportunity to obtain by investing the funds

it delayed or avoided spending on pollution control measures. This rate can be used to move dollars through time and determine the Defendant's economic benefit as of a given date.

The court adopts the capital-asset pricing model as the appropriate method for determining the Defendant's benefit of noncompliance. Under the capital-asset pricing model, the discount rate is computed by using a risk-free component, which is based on short-term United States Treasury Bills, and a near-constant risk premium. Using the capital-asset pricing model, Dr. Michael Kavanaugh, the Plaintiffs' economic expert, determined that the appropriate discount rate for this case 15.25%.[3]

The court finds that the economic benefit the Defendant enjoyed by its failure to make timely expenditures for pollution control equipment is substantially in excess of the $100,000 penalty amount as of July 1, 1992, the approximate date of the Defendant's penalty payment to DHEC. Although the court

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[3]Dr. Kavanaugh also calculated the Defendant's economic benefit using two alternative discount rates. First, Dr. Kavanaugh performed the calculation using 18.1% as the discount rate. This was the rate that EPA used at the time of DHEC's lawsuit against Laidlaw in June 1992. Naturally, if the 18.1% discount rate were used for the economic benefit calculation, the Defendant's economic benefit as of the July 1992 penalty payment date would be significantly larger than that calculated using the 15.25% rate.

Second, Dr. Kavanaugh performed the economic benefit calculation using 11.9% as the discount rate. This is the rate that the EPA currently recommends. The 11.9% discount rate is based on a national average for a company's weighted average cost of capital, or WACC. WACC is a method of determining the cost of capital to a company by combining the debt cost of capital and equity cost of capital and weighing those costs based on the proportion of debt and equity in a company's financial structure. WACC is therefore not based on the return an investor could have earned on funds not spent on pollution control, but is a based on the cost of obtaining the money. Since the point of removing economic benefit is to remove the earnings that could be obtained by the discharger by not investing in the actions needed for permit compliance, an equity rate, such as the 15.25% rate used by Dr. Kavanaugh, is preferable to a WACC rate.

accepts Dr. Kavanaugh's methodology or using the capital-asset pricing model to determine a violator's economic benefit of noncompliance, the court declines, at this time, to make a specific finding on the precise amount of the Defendant's economic benefit.

The court's preliminary determination that the penalty imposed by DHEC in the June 9, 1992 Consent Order failed to recover the Defendant's economic benefit of noncompliance is based on the following delayed or avoided expenditures.

1. Neutralization and pH control equipment

The neutralization and pH control equipment that the Defendant had in 1987 was inadequate, according to both Dr. Bruce A. Bell, the Plaintiffs' wastewater treatment expert, and Dr. Thomas Keinath, the Defendant's wastewater treatment expert. By late 1988, the Defendant had replaced its neutralization system with adequate neutralization tanks, a PH control system and freeze protection.[4] The neutralization and pH control system that the Defendant installed was necessary for it to comply with both the metals and pH limits in its permit that became effective on January 1, 1987. This system is necessary for compliance with the metals limits because the removal of metals is dependent on adequately controlling the pH levels in the wastewater. As Dr. Bell testified, the technology for neutralization and pH control has been available at least since the 1960s. Therefore, the court finds that the changes the Defendant made to its neutralization system in 1988 should have been made in time to comply with its metals and pH permit limits that went into effect on January 1, 1987.

[4]The pH system consists of equipment that automatically controls the dose of caustic soda to regulate the pH level in the Defendant's wastewater.

2. Lancy system

Dr. Keinath testified that the dual carbon filter system that the Defendant had in place prior to 1991 did not enable the Defendant to comply with the metals limits in its permit. Dr. Keinath further testified that some metals which are regulated in the Defendant's permit, such as arsenic and antimony, are not easily removed with carbon treatment.

As noted earlier, the Defendant decided in late 1989 or early 1990 to install the Lancy system. The Defendant began operating the Lancy system in March 1991.

The Lancy system consists of equalization, neutralization, sulfide addition, a retention tank, an adsorption filter, and final PH control. According to both Dr. Keinath and Dr. Bell, the Lancy system consists entirely of technology that was available prior to 1987. Dr. Bell testified that the Lancy system has been commercially available since at least 1984. Dr. Keinath testified that, according to the 1985 text, *Industrial Wastewater Treatment Technology* by Dr. James Patterson, the technologies available for treatment of mercury in 1985 were carbon adsorption and ion exchange. However, Dr. Patterson's chapter on mercury removal lists several technologies other than carbon adsorption and ion exchange that were available for mercury removal in 1985. The first technology that Dr. Patterson notes as being available for mercury removal is sulfide addition, which, he writes, can be combined with filtration. Sulfide addition and filtration are the basic technologies underlying the Lancy system. In addition, Dr. Keinath testified that he believed that the Lancy system was unproven technology for mercury removal in 1987. In fact, as both Dr. Keinath and Dr. Bell testified, the Lancy system was unable by itself to remove enough mercury to allow the Defendant to meet the 1.3 ppb mercury limit. However, Dr. Keinath also testified that the Lancy system "could well have been utilized" in 1987 for treatment of metals other than

mercury. Dr. Keinath further testified that the Lancy system had in fact been installed by other dischargers before the Defendant installed the Lancy system.

The court recognizes that the Lancy system "was not available for off-the-shelf purchase in 1986, nor is it currently available for off-the-shelf purchase; rather, the Lancy system consists of technology which must be engineered and manufactured specifically for the purchaser. Nevertheless, according to both Dr. Keinath and Dr. Bell, the Lancy system or its functional equivalent was necessary for the Defendant to comply with the non-mercury metals limits in its permit that went into effect on January 1, 1987. The Lancy system or its functional equivalent also would have enabled the Defendant to comply with the 10 ppb mercury limit that was in effect from January 1, 1987 to December 31, 1987. Therefore, the court finds that the Defendant should have installed the Lancy system or its equivalent by January 1, 1987.

3. Additional mercury-removal equipment

As noted previously, the Lancy system brought the Defendant into compliance with the non-mercury metals limits in its permit, but was unable to achieve the 1.3 ppb mercury limit. In 1992 and 1993, the Defendant installed additional equipment, including carbon adsorption equipment, prefilters, ion exchange equipment, and microfiltration, to remove mercury from its wastewater. In July 1992, the Defendant installed new carbon adsorption equipment. Also, in January 1993, the Defendant installed prefilters, which [illegible] necessary to protect the carbon adsorption equipment. Finally, in April 1993, the Defendant installed ion exchange equipment, as well as microfiltration equipment to remove small particulate mercury formed during the sulfide precipitation process in the Lancy system.

Dr. Keinath testified that he believes that the Defendant

could comply with its permit with only the Lancy system and microfiltration and that the carbon adsorption filters and ion exchange equipment that the Defendant installed were "redundancies." However, Dr. Keinath also testified that both carbon adsorption and ion exchange equipment remove some mercury, that the Defendant's mercury violations continued until after this equipment was in place, and that he was uncertain whether the Defendant could actually comply with its permit without the carbon adsorption and ion exchange equipment.

When the Defendant applied for a permit to construct activated carbon equipment, it stated that such equipment would "further reduce mercury concentrations to below 1.3 ppb in the wastewater discharge." The Defendant's activated carbon equipment in fact worked well to remove mercury from the Defendant's wastewater. Furthermore, when the Defendant applied for a permit to construct ion exchange equipment, it stated that, in conjunction with microfiltration, such equipment "will ensure compliance" with the Defendant's mercury limit. The Defendant's ion exchange equipment also worked well to remove mercury from the Defendant's wastewater. The carbon adsorption filters and ion exchange equipment are designed to remove soluble mercury from the Defendant's wastewater. A test conducted by the Defendant on actual effluent from the Lancy system showed that soluble mercury in concentrations greater than the Defendant's permit limit for mercury sometimes passes through both the Lancy system and the microfiltration equipment. The carbon adsorption and ion exchange equipment are therefore necessary to enable the Defendant to comply with its permit limit for mercury.

All of the mercury removal equipment that the Defendant installed in 1992 and 1993 was necessary to ensure the Defendant's compliance with the 1.3 ppb mercury limit. All of this mercury removal technology was commercially available before the Defendant purchased the facility in 1986.

Therefore, the court finds that the Defendant should have installed the additional mercury removal equipment by January 1, 1988, in order to satisfy the mercury limit in its permit.

In summary, to comply with its permit the Defendant should have installed by January 1, 1987 all of the equipment that is currently in place, or its functional equivalent, with the exception of the equipment that was designed specifically for mercury removal. The Defendant should have installed the remaining mercury removal equipment, or its functional equivalent, by January 1, 1988.

The Defendant realized a significant economic benefit by taking seven years to achieve compliance with its NPDES permit limits. Although Dr. Keinath testified that each of the individual wastewater treatment measures undertaken by the Defendant was logical, the Defendant profited by operating its facility for seven years despite continuing permit violations. In other words, the Defendant is better off now, even after paying the $100,000 penalty, than it would have been had it made the expenditures necessary to comply with its permit in a timely fashion or had it simply shut down the facility until compliance were possible.

III. CONCLUSIONS OF LAW

Congress enacted the Clean Water Act ("CWA" or "the Act") in 1972 "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251 (a). To achieve the stated goals of the Act, section 301(a) makes unlawful the discharge of any pollutant into any navigable waters, except as specifically authorized by certain enumerated sections of the Act. 33 U.S.C. § 1311 (a).

One of these exceptions is section 402, 33 U.S.C. § 1342, which establishes the National Pollutant Discharge Elimination System ("NPDES"). Pursuant to section 402(a), or

pursuant to a state program authorized under section 402(b), the appropriate regulatory authority may issue permits that allow the holder to discharge pollutants in accordance with the conditions and limitations set forth in the permit.[5]

The holder of an NPDES permit who fails to comply with the conditions of its permit may be subject to administrative, civil, or criminal sanctions. 33 U.S.C. § 1319. Permits issued under a state NPDES program are subject to both federal and state enforcement actions. *See id.*; 33 U.S.C. § 1342(b)(7). In addition, section 505 of the CWA authorizes private citizens, under certain circumstances, to bring civil actions to enforce any effluent standard or limitation under the Act, including NPDES permits. 33 U.S.C. § 1365(a)(1).

Section 505(b)(1) provides two significant limitations on a citizen's right to bring a citizen enforcement suit under the CWA.[6] First, under section 505(b)(1)(A), the citizen must provide notice of the alleged violation to the Administrator of

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[5]Section 402(a) grants to the Administrator of the EPA the authority to issue permits for the discharge of pollutants in accordance with the conditions, as set forth in each permit, that the
Administrator determines are necessary to carry out the provisions of the CWA. 33 U.S.C. § 1342(a). Section 402(b) authorizes each state to establish and administer its own NPDES program, subject to the approval and continued monitoring of the Administrator, for navigable waters within the state's jurisdiction. 33 U.S.C. § 1342(b). After a state's NPDES program receives approval under section 402(b), the Administrator suspends the issuance of federal NPDES permits as to the navigable waters subject to the state program, unless the Administrator determines that the state program fails to conform to the guidelines established pursuant to the Act. 33 U.S.C. § 342(c)(1).

South Carolina has established its own NPDES program pursuant to section 402(b). On June 10, 1975, the Administrator of the EPA delegated to DHEC the responsibility for administering the NPDES program in South Carolina. *See* 57 Fed. Reg. 43,734 (Sept. 22, 1992).

[6]In addition, as provided by section 505(a), 33 U.S.C. § 1365(a), citizen suits may also be limited by section 309(g)(6), 33 U.S.C. § 1319(g)(6). However, the Defendant has not asserted that any of the provisions or section 309(g)(6) apply to this case.

the EPA, to the state enforcement agency of the state in which the alleged violation occurs, and to the alleged violator at least sixty days before the citizen may file a citizen suit. 33 U.S.C. § 1365(b)(1)(A). Second, section 505(b)(1)(B) provides that no citizen suit may be commenced "if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with [the same NPDES permit]." 33 U.S.C. § 1365(b)(1)(B).

In the matter currently before the court, the Defendant contends that section 505(b)(1)(B) precludes the Plaintiffs' lawsuit because, it argues, DHEC "diligently prosecut[ed]" an enforcement action against Laidlaw in South Carolina state court on June 9, 1992, which action was settled by judicial consent order on June 10, 1992.

The Plaintiffs raise several arguments in opposition to the Defendant's contention that their citizen suit is barred under section 505(b)(1)(B) by DHEC's lawsuit against the Defendant. The Plaintiffs initially argue that section 505(b)(1)(B) bars the commencement of a citizen suit only while a state or federal enforcement action is pending, but not after that action has been concluded. In other words, the Plaintiffs urge the court to interpret section 505(b)(1)(B) only to prohibit citizen suits and federal or state enforcement suits from proceeding simultaneously. The Plaintiffs assert that section 505(b)(1)(B) does not bar their action because DHEC's action against Laidlaw in June 1992 was settled before the Plaintiffs filed their suit. The Plaintiffs base their argument on a plain reading of section 505(b)(1)(B), which provides that no citizen suit may be commenced if the enforcement agency "has commenced and *is diligently prosecuting*" a judicial action against the alleged violator. 33 U.S.C. § 1365(b)(1)(B) (emphasis added).

Section 505(b)(1)(B) obviously contemplates a situation in which a citizen proposes to file a private enforcement suit contemporaneously with an ongoing governmental enforcement

suit. Indeed, as one district court recognized, "the purpose underlying the 'diligent prosecution' provision [is] that a defendant not be subjected simultaneously to multiple suits, and potentially to conflicting court orders, to enforce the same statutory standard." *Connecticut Fund for the Environment v. Contract Plating Co.*, 631 F. Supp. 1291, 1293 (D. Conn. 1986). Moreover, the provision in section 505(b)(1)(B) that allows any citizen to intervene as of right in any enforcement action brought in federal court clearly envisions the governmental action pending at the time of the attempted citizen suit. However, it is doubtful that Congress intended the preclusive effect of section 505(b)(1)(B) to expire once the government has concluded its diligent prosecution of a particular violator.

As the Defendant observed in response to the Plaintiffs' argument, reading section 505(b)(1)(B) only in the present tense would allow citizens to bring a private enforcement action against any alleged violator, as long as the citizen waited until the conclusion of the governmental action before bringing the citizen suit.[7] Such a result would be contrary to the United

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[7]The court has contemplated that perhaps the concern about potentially duplicative citizen suits could be addressed by the common-law principle of *res judicata*. For example, if a state enforcement agency is deemed to represent all of the state's citizens as *parens patriae*, then an judicial enforcement actions it resolves, either through settlement or judgment, might be binding on the citizens of the state through traditional principles of claim preclusion. *See, e.g., United States EPA v. City of Green Forest, Ark.*, 921 F.2d 1394, 1404 (8th Cir. 1990) (holding that "'once a state represents all of its citizens in a *parens patriae* suit, a consent decree or final judgment entered in such a suit is conclusive upon those citizens and is binding upon their rights'")(quoting *United States v. Olin Corp.*, 606 F. Supp. 1301, 1304 (N.D. Ala. 1985)), *cert denied*, 502 U.S. 956 (1991). Because this issue was not examined at the hearing or in the memoranda of the parties, the court invited both parties to submit supplemental briefs on this issue.

In response, the Plaintiffs assert that the CWA preempts common-law principles of *res judicata* because section 505(a) specifically provides that citizen suits may be brought "[e]xcept as provided in subsection (b) of this section and section 309(g)(6)." 33 U.S.C. § 1365(a). The Plaintiffs argue that because Congress

States Supreme Court's declaration in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found.*, 484 U.S. 49 (1987), that "citizen suits are proper only 'if the Federal, State, and local agencies fail to exercise their enforcement responsibility.'" *Id.* at 60 (quoting S. Rep. No. 414, 92d Cong., 1st Sess. 64 (1971), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3730). Thus, although the "diligent prosecution" condition in section 505(b)(1)(B) is phrased in the present tense, the court has determined that Congress intended to prohibit citizen suits where the governmental enforcement agency is diligently prosecuting or has diligently prosecuted a judicial action to enforce the same alleged violations of a particular permit, standard, or limitation.

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explicitly stated that citizen suits can be brought in all other situations, no other limitations, including *res judicata*, apply to citizen suits.

Furthermore, the Plaintiffs argue that a state enforcement action would not preclude, under *res judicata*, a subsequent citizen suit because the two actions would not involve identical parties or their privies. Identity of parties is generally one of the required elements of *res judicata*. *See Nash County Bd. of Educ. v. Biltmore Co.*, 640 F.2d 484, 486 (4th Cir.), *cert. denied*, 454 U.S. 878 (1991). The Plaintiffs recognize that, in a *parens patriae* action, a state represents all of its citizens so that a state action can bar a subsequent, identical action brought by a citizen of the state. *See New Jersey v. New York*, 345 U.S. 369, 372-73 (1953). However, the Plaintiffs argue that in granting citizens the rights to enforce the CWA, Congress recognized that governmental enforcement agencies may not adequately represent the interests of their citizens. Therefore, argue the Plaintiffs, Congress did not intend for citizen suits under the CWA to be restricted by the *parens patriae* doctrine.

The Defendant also argues against the application of *res judicata* in a situation such as that presently at bar. The Defendant primarily asserts that *res judicata* would not apply because there would be no identity of parties between a state enforcement suit and a subsequent citizen suit.

This court need not resolve whether the doctrine of *res judicata* would apply to bar a CWA citizen suit after a governmental enforcement action has been concluded. Generally, *res judicata* is an affirmative defense, which must be specifically pleaded or else it is deemed to be waived. Fed. R. Civ. P. 8(c); *see Sanchez v. City of Santa Ana*, 915 F.2d 424, 431 (9th Cir. 1990), *cert. denied*, 502 U.S. 815 (1991). Because the Defendant has not raised *res judicata* as a defense in this action, this issue is not before the court.

Therefore, the critical issue presently before the court is whether DHEC's June 9, 1992 lawsuit against Laidlaw constitutes diligent prosecution sufficient under section 505(b)(1)(B) to bar the Plaintiffs' citizen suit. This inquiry is guided by several principles that have been developed in the caselaw interpreting the citizen-suit provisions of the CWA.[8]

First, the citizen-plaintiffs bear the burden of proving that the state agency's prosecution was not diligent. This burden is a heavy one because diligence on the part of the enforcement agency is presumed. *See Connecticut Fund for the Environment v. Contract Plating Co.*, 631 F. Supp. at 1293. As several courts have recognized, "the state [enforcement] agency must be given great deference to proceed in a manner it considers in the best interests of all parties involved." *Arkansas Wildlife Fed'n v. ICI Americas Inc.*, 842 F. Supp. 1140, 1147 (E.D. Ark. 1993), *aff'd* 29 F.3d 376 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 1094 (1995).

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[8]The issue of diligent prosecution under section 505(b)(1)(B) of the CWA is a federal standard, not a state-law standard as the Defendant asserts. When there is a question concerning what law governs a claim, "it is the *source* of the right sued upon . . . which determines the governing law." *Maternally Yours, Inc. v. Your Maternity Shop, Inc.*, 234 F.2d 538, 540 n.1 (2d Cir. 1956); *see also* 19 Charles A. Wright et al., *Federal Practice & Procedure* § 4515 (1982). When an issue arises under a comprehensive federal statute such as the CWA, that issue should be decided according to federal law. *See PIRG v. Top Notch Metal Finishing Co.*, 29 Env't Rep. Cas. (BNA) 1022, 1028 (D.N.J. 1988) (holding in Clean Water Act case that federal law should be used to decide issue of piercing of corporate veil).

The Defendant's reliance on *United States v. T & S Brass & Bronze Works, Inc.*, 28 Env't Rep. Cas. (BNA) 1649 (4th Cir. 1988), to argue that the court should not impose on a state program a federal standard of diligent prosecution is misplaced. The court in the *T & S Brass* case merely held that state regulations, not federal regulations, govern the closure and post-closure activities of hazardous waste facilities where the federal government has given the state the authority to operate its own regulatory scheme for hazardous wastes in lieu of the federal program. *Id.* at 1650-51. The *T & S Brass* court did not address the standards governing federal enforcement of those regulations.

Deference to governmental enforcement agencies is appropriate because the CWA delegates the primary enforcement responsibility to designated state and federal agencies. For example, the requirement in section 505(b)(1)(A) that a citizen must file a notice letter sixty days before bringing a private enforcement suit clearly was designed to give the governmental agencies the "first shot" at enforcement. As the Supreme Court stated in *Gwaltney*, "the citizen suit is meant to supplement rather than to supplant governmental action." 484 U.S. at 60. Appropriate limitations on citizen suits generally "allow for smoother operation of ordinary enforcement mechanisms" and encourage out-of-court settlements between agencies and polluters. *Connecticut Coastal Fishermen's Ass'n v. Remington Arms Co.*, 777 F. Supp. 173, 179, 186 (D. Conn. 1991), *aff'd in part, rev'd in part*, 989 F.2d 1305 (2d Cit. 1993); *cf. Supporters To Oppose Pollution, Inc. v. Heritage Group*, 973 F.2d 1320, 1324 (7th Cir. 1992) (in action under the Resource Conservation and Recovery Act (RCRA), stating: "An Administrator unable to make concessions is unable to obtain them. A private plaintiff waiting in the wings then is the captain of the litigation.... To say . . . that the EPA is not 'diligently prosecuting' the action if it does not sue the person, or use the theories, the plaintiff prefers would strip EPA of the control the statute provides.").

On the other hand, Congress certainly intended to provide private citizens with significant opportunities to participate in the enforcement of the CWA. *See* S. Rep. No. 414, *supra*, at 72, *reprinted in* 1972 U.S.C.C.A.N. at 3738 ("An essential element in any control program involving the nation's waters is public participation. The public must have a genuine opportunity to speak on the issue of protection of its waters. . . . The scrutiny of the public . . . is extremely important in insuring expeditious implementation of the authority and a high level of performance by all levels or government and discharge sources."). As the United States Court of Appeals for the

Second Circuit stated, "'Congress made clear that citizen groups are not to be treated as nuisances or troublemakers but rather as welcomed participants in the vindication of environmental interests.'" *Friends of the Earth v. Consolidated Rail Corp.*, 768 F.2d 57, 63 (2d Cir. 1985) (quoting *Friends of the Earth v. Carey*, 535 F.2d 165, 172 (2d Cir. 1976) (referring to citizen suit provision of the Clean Air Act[9]. In addition to authorizing citizen suits under section 505, the CWA provides several opportunities for citizens to participate in governmental enforcement activities. Indeed, as noted previously, the last phrase of section 505(b)(1)(B) provides that if a citizen suit is barred by the EPA's or the state's diligent prosecution of a judicial action, "in any such action in a court of the United States any citizen may intervene as a matter of right." [10] 33 U.S.C. § 1365(b)(1)(B).

Also, section 309(g) contains provisions for public participation in administrative actions brought by the EPA. Section 309(g)(4)(A) requires the EPA to provide public notice of and reasonable opportunity to comment on the proposed issuance of any order assessing civil administrative penalties under section 309(g). 33 U.S.C. § 1319(g)(4)(A). In addition, section 309(g)(4)(B) provides that anyone who comments on the proposed assessment of an administrative penalty shall be notified of the hearing and "shall have a reasonable opportunity to be heard and to present evidence." 33 U.S.C. § 1319(g)(4)(B). Any person who comments on the proposed

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[9]The citizen-suit provision in the CWA was modeled after the provision in the Clean Air Act. S. Rep. No. 414, *supra*, at 79, *reprinted in* 1972 U.S.C.C.A.N. at 3745.

[10]Apparently Congress limited intervention of right under section 505(b)(1)(B) to cases in federal court because, under general principles of federalism and state sovereignty, Congress likely would have no authority directly to provide citizens the right to intervene in state-court enforcement actions.

assessment of civil penalties may obtain judicial review of such assessment. 33 U.S.C. § 1319(g)(8).

Moreover, the federal regulations that list the requirements for state enforcement authorities administering NPDES programs provide, in part:

> Any State administering [an NPDES] program shall provide for public participation in the State enforcement process by providing either:
>
> (1) Authority which allows intervention as of right in any civil or administrative action to obtain remedies specified in paragraphs (a)(1), (2) or (3) of this section by any citizen having an interest which is or may be adversely affected;[11] or
>
> (2) Assurance that the State agency or enforcement authority will:
>
> (i) Investigate and provide written responses to all citizen complaints submitted pursuant to the procedures specified in § 123.26(b)(4);
>
> (ii) Not oppose intervention by any citizen when permissive intervention may be authorized by statute, rule, or regulation;[12] and
>
> (iii) Publish notice of and provide at least 30 days for public comment on any proposed settlement of a State enforcement action.

40 C.F.R. § 123.27(d).[13]

In addition, the importance of public participation in the enforcement of the CWA has been recognized by several courts interpreting section 309(g)(6)(A). That section provides, in part, that "any . . . violation with respect to which a State has commenced and is diligently prosecuting an action under State law comparable to this subsection ... shall not be the subject of a civil penalty action under [section 1319(d) . . . or section 1365 of this title [the citizen suit provision]]." 33 U.S.C. § 1319(g)(6)(A). One issue that has repeatedly arisen in citizen suit litigation is whether a state's scheme for administrative enforcement actions is "comparable to" the federal provisions, sufficient under section 309(g)(6)(A) to preclude a citizen suit. In making this determination, courts often focus on whether the state's enforcement mechanisms contain provisions to ensure adequate participation by private individuals in administrative enforcement actions. *See, e.g., Arkansas Wildlife Fed'n v. ICI Americas, Inc.* 29 F.3d 376, 381 (8th Cir. 1994) (holding that, to be comparable to federal law for purposes of section 309(g)(6)(A), state law must "provide interested citizens a meaningful opportunity to participate at significant stages of the decision-making process, and adequately safeguard □ their

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[11]The South Carolina Rules of Civil Procedure contain a provision for intervention of right. Rule 24(a) provides:

> Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

S.C. R. Civ. P. 24(a).

[12]The South Carolina rules also allow for permissive intervention. *See* S.C. R. Civ. P. 24(b).

[13]Under these regulations, "Any State program approved by the Administrator shall at all times be conducted in accordance with the requirements of [Part 123, which is entitled, 'State Program Requirements']." 40 C.F.R. § 123.1(f).

legitimate substantive interests"), *cert. denied*, 115 S. Ct. 1094 (1995); *North & South Rivers Watershed Ass'n v. Scituate*, 949 F.2d 552, 556 n.7 (1st Cir. 1991) ("So long as the provisions in the State Act adequately safeguard the substantive interests of citizens in enforcement actions, the rights of notice and public participation found in the State Act are satisfactorily comparable to those found in the Federal Act."); *Atlantic States Legal Found. v. Universal Tool & Stamping Co.*, 735 F. Supp. 1404, 1415 (N.D. Ind. 1990) ("'[I]n order to be comparable, a State law *must* provide for a right to a hearing and for public notice and participation procedures similar to those set forth in section 309(g) . . . .'") (quoting 133 Cong. Rec. S737 (daily ed., Jan. 14, 1987)).

Thus, the issue presently before the court involves a delicate balance between the Act's preference for governmental enforcement efforts and the recognized policy of allowing private citizens to participate in the enforcement process. Of course, the overriding concern is to assure vigorous enforcement of the CWA to achieve the stated goals of the Act.

The Plaintiffs argue that DHEC's prosecution of Laidlaw in June 1992 was not sufficiently diligent under section 505(b)(1)(B) to preclude their citizen suit. The Plaintiffs challenge both the procedural aspects of the DHEC lawsuit and also the substance of the settlement agreement. In determining whether DHEC's lawsuit against Laidlaw was diligently prosecuted, the court will analyze the Plaintiffs' allegation of lack of diligence "against the background of the agency action." S. Rep. No. 414, *supra*, at 80, *reprinted in* 1972 U.S.C.C.A.N. at 3746; *see also SPIRG v. Fritzsche, Dodge & Olcott, Inc.*, 579 F. Supp. 1528, 1535 (D.N.J. 1984) ("An evaluation of 'diligence' measures comprehensively the process and effects of agency prosecution."), *aff'd on other grounds*, 759 F.2d 1131 (3d Cir. 1985).

The Plaintiffs allege several procedural defects to support their claim that the DHEC action should not preclude

their citizen suit. First, DHEC filed its complaint and consent order in state court on the very last day of the statutory sixty-day notice period during which it was possible under section 505(b) for a state-court action to preclude a citizen suit. Second, the complaint was filed at the Defendant's request, solely to accommodate the Defendant's desire to bar a citizen suit. The Plaintiffs contend that the judicial action served no purpose of DHEC beyond that provided by the usual administrative enforcement action. Third, Laidlaw drafted the state-court complaint and settlement agreement, filed the lawsuit against itself, and paid the filing fee. And finally, the settlement agreement between DHEC and Laidlaw was entered into with unusual haste, without giving the Plaintiffs the opportunity to intervene.

Although the procedural aspects of DHEC's June 9, 1992 action against the Defendant are somewhat suspect, they do not, in and of themselves, establish a lack of diligent prosecution.[14] *Cf. Atlantic States Legal Found. v. Universal*

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[14]The Plaintiffs argue that DHEC's action against Laidlaw was collusive and, therefore, that the lawsuit should have no preclusive effect under section 505(b)(1)(B). The Plaintiffs analogize the preclusive effect of section 505(b)(1)(B) to that of res judicata. As the Plaintiffs observe, a collusive action has no preclusive effect under res judicata. *See Morris v. Jones*, 329 U.S. 545, 550-51 (1947) ("'A judgment of a court having jurisdiction of the parties and of the subject matter operates as res judicata, in the absence of fraud or collusion . . . .'") (quoting *Riehle v. Margolies*, 279 U.S. 218, 225 (1929)). To support their claim of collusion, the Plaintiffs cite the following definition of the term "collusive action":

> An action not founded on an actual controversy between the parties to it, but brought for [the] purpose of securing a determination of a point of law for the gratification of curiosity or to settle rights of third persons not parties. Such actions will not be entertained for the courts will decide only "cases or controversies."

Black's Law Dictionary 265 (6th ed. 1990) (citing *City & County of San Francisco v. Boyd*, 140 P.2d 666, 669, 670 (Cal. 1943)).

The court does not find that the action between DHEC and Laidlaw in June 1992 was the product of fraud or collusion between the parties. Such a finding does not, however, mean that DHEC's action was diligent prosecution for purposes

Tool & Stamping Co., 735 F. Supp. at 1416 (finding that state's prosecution was not diligent because, *inter alia*, counsel for the defendant "walked through" the interlocutory consent decree for approval in the offices of the state agency in a single day; procedure was highly unusual as the approval and signing of such decrees usually requires four to six weeks). The court is quite concerned, however, that because DHEC settled its action against Laidlaw only one day after the lawsuit was filed the Plaintiffs simply had no chance to intervene. *See Love v. New York State Dep't of Envtl. Conservation*, 529 F. Supp. 832, 843-44 (S.D.N.Y. 1981) (in holding that state failed to diligently prosecute an administrative action, the court cited, *inter alia*, the lack of opportunity for the citizen plaintiffs to intervene); *Sierra Club v. SCM Corp.*, 572 F. Supp. 828, 830-31 (W.D.N.Y. 1983) (holding that "where settlement of permit violations is achieved as a result of enforcement proceedings in which plaintiffs, as members of the public, lacked the opportunity to be heard on the merits of the proposed consent order, a citizens suit pursuant to 33 U.S.C. Section 1365(a)(1) may properly be entertained by a federal district court"). Because of the importance of public participation in the enforcement processes of the CWA, as discussed above, the absence of a meaningful opportunity for the citizen plaintiffs to intervene in this case triggers a heightened scrutiny into the settlement of the underlying case between DHEC and Laidlaw. In examining the totality of the circumstances surrounding DHEC's prosecution of Laidlaw, the court is compelled to conclude that this procedural deficiency weighs in favor of the Plaintiffs.

The Plaintiffs also contend that the substantive provisions of the Consent Order between DHEC and Laidlaw demonstrate that DHEC's state-court action was not diligently

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of section 505(b)(1)(B).

prosecuted. The Plaintiffs identify several aspects of the Consent Order that they allege demonstrate a lack of diligence on the part of DHEC. First, the Consent Order did not provide that the court's jurisdiction would continue in order to enforce the decree, but only that the Defendant's violations of the order's terms would subject it to "additional enforcement action." Consent Order and Decree, at 5, ¶ 13 (June 9, 1992) (Def. Ex. 167). The Consent Order also provides that DHEC's complaint to be dismissed. *Id.* at 4, ¶ 1. In addition, DHEC did not obtain an injunction requiring the Defendant to comply with its permit; instead, the Consent Order merely required the Defendant to "use every effort" to comply with its mercury limit. *Id.* at 5, ¶ 10. Furthermore, the Consent Order did not contain stipulated penalties for future violations of the Defendant's permit. The Consent Order provides:

> This Consent Order constitutes a full, fair, reasonable, and complete settlement of the allegations contained in the complaint filed in this case, and all other claims covered by this Consent Order, *including all claims Plaintiff [DHEC] might have arising out of or in any way connected with alleged violations of NPDES Permit No. SC0040517.*

Id. at 4, ¶ 4 (emphasis added). The Consent Order further provides that the Defendant will be discharged from liability for "any and all violations occurring during the period covered by this Consent Order." *Id.* at 6, ¶ 14. Finally, the Consent Order extended for an indefinite period into the future, until the Defendant demonstrated compliance with the mercury limitation of its permit. *Id.* at 6, ¶ 15.

The mere fact that a settlement reached by the state is less burdensome to the defendant than the remedy sought in the complaint in the citizen suit does not establish that the state failed to prosecute its action diligently. *See Connecticut Fund*

for the Environment v. Contract Plating Co., 631 F. Supp. at 1294. However, the lack of substantial relief in a settlement is properly considered by the court in determining whether the state action was diligently prosecuted. *See New York Coastal Fishermen's Ass'n v. Department of Sanitation*, 772 F. Supp. 162, 168 (S.D.N.Y. 1991) (holding that the state's prosecution was not diligent because it allowed permit compliance to be delayed and because the state agency had acted "as a pen pal, not a prosecutor"); *Atlantic States Legal Found. v. Universal Tool & Stamping Co.*, 735 F. Supp. at 1416 (finding that state's enforcement activities did not constitute diligent prosecution because the state's administrative proceeding had little effect upon the defendant's efforts to comply with its permit and because the state assessed a lenient penalty of only $10,000 for hundreds of violations, which were susceptible of a $25,000 penalty per violation). In addition, a state's failure enforce its consent order constitutes some evidence that its prosecution was not diligent. *See Atlantic States Legal Found. v. Universal Tool & Stamping Co.*, 735 F. Supp. at 1416; *Love v. New York State Dep't of Envtl. Conservation*, 529 F. Supp. at 844; *Sierra Club v. SCM Corp.*, 572 F. Supp. 828, 831 n.3 (W.D.N.Y. 1983). The court determines that these deficiencies alleged by the Plaintiffs are not, in and of themselves, dispositive or the issue of diligent prosecution. However, when viewed in light of all of the circumstances surrounding DHEC's settlement with Laidlaw, these factors also weigh in favor of allowing the Plaintiffs' lawsuit to proceed.

The Plaintiffs' strongest challenge to DHEC's diligence in prosecuting Laidlaw relates to the amount of the penalty imposed for Laidlaw's NPDES violations. A lenient penalty that is far less than the maximum penalty may provide evidence of non-diligent prosecution. *Atlantic States Legal Found. v. Universal Tool & Stamping Co.*, 735 F. Supp. at 1416. As the Plaintiffs observe, the penalty obtained by DHEC was far less than the maximum possible penalty. According to the Fact

Sheet accompanying DHEC's May 21, 1992 Notice of Enforcement Conference, the DHEC lawsuit concerned 227 permit violations between April 1991 and March 1992. Def. Ex. 159. Since the maximum penalty under the South Carolina Pollution Control Act is $10,000 per day of violation, S.C. Code Ann. § 48-1-330 (Law. Co-op. 1987), DHEC could have sought a penalty from the Defendant as high as $2,270,000. As noted above in the findings of fact, however, DHEC's initial penalty request was only $120,000, and DHEC and the Defendant ultimately agreed to a penalty of only $100,000. Furthermore, the Consent Order purports to cover all of the Defendant's violations of its permit, even though the DHEC Notice of Enforcement Conference does not list many of the violations alleged in the Plaintiffs' complaint.

The Plaintiffs' most persuasive argument that DHEC's lawsuit against Laidlaw was not diligent prosecution is that in imposing the civil penalty of $100,000 against Laidlaw, DHEC failed to recover, or even to calculate, the economic benefit that Laidlaw received by not complying with its permit. Economic benefit refers to the amount of money that Laidlaw allegedly saved by delaying the purchase, installation, and maintenance of equipment necessary to comply with its NPDES permit in a timely fashion.

The civil penalty provisions in the CWA are intended to reduce pollution of the nation's waterways by deterring persons from violating the requirements of the Act. *See Hawaii's Thousand Friends v. City & Council of Honolulu*, 821 F. Supp. 1368, 1394 (D. Haw. 1993) (citing *Tull v. United States*, 481 U.S. 412, 422-23 (1987)). A penalty serves as a successful deterrent only if potential violators believe that they will be worse off by not complying with the applicable requirements.[15] *See Atlantic States Legal Found. v. Tyson*

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[15]Courts have recognized this principle in contexts other than the Clean Water

Foods, Inc., 897 F.2d 1128, 1141 (11th Cir. 1990) ("Insuring that violators do not reap economic benefit by failing to comply with the statutory mandate is of key importance if the penalties are successfully to deter violations."); *United States v. Roll Coater, Inc.*; 21 Envtl. L. Rep. (Envtl. L. Inst.) 21073, 21075 (S.D. Ind. 1991) ("[U]nless the [defendant] company is fined an amount at least as great as the economic gain in not complying with the regulations, the statute serves little deterrent value."). The court in *PIRG v. Powell Duffryn Terminals, Inc.*, 720 F. Supp. 1158 (D.N.J. 1989), *aff'd in part, rev'd in part*, 913 F.2d 64 (3d Cir. 1990), *cert. denied*, 498 U.S. 1109 (1991), explained well the purposes behind civil penalties:

> Civil penalties seek to deter pollution by discouraging future violations. To serve this function, the amount of the civil penalty must be high enough to insure that polluters cannot simply absorb the penalty as a cost of doing business. Otherwise, a rational profit maximizing company will choose to pay the penalty rather than incur compliance costs. Additionally, the probability that a penalty will be imposed must be high enough so that polluters will not choose to accept the risk that non-compliance will go unpunished.

Act. *See, e.g., United States v. A.A. Mactal Constr. Co.*, 22 Envtl. L. Rep. (Envtl. L. Inst.) 21200, 21201 (D. Kan. 1992) (in determining penalty under the Clean Air Act, stating that "unless the violator is fined an amount at least as great as the economic gain it enjoyed in not complying with the regulations, the statute serves little deterrent value"; and finding that "the recovery economic benefit is essential and that economic benefit should serve as the floor below which the maximum civil penalty should not be mitigated"); *cf. United States v. ITT Continental Baking Co.*, 420 U.S. 223, 231 (1975) (in case under the Federal Trade Commission Act, stating that "Congress was concerned with avoiding a situation in which the statutory penalty would be regarded by potential violators of FTC orders as nothing more than an acceptable cost of violation, rather than as a deterrence to violations.").

Id. at 1166 (citations omitted). Similarly, only by removing the economic benefit of noncompliance can a civil penalty ensure that a violator receives no economic advantage *vis-à-vis* its competitors who comply in a timely fashion with all environmental regulations. *PIRG v. Powell Duffryn Terminals, Inc.*, 913 F. 2d at 80 (quoting S. Rep. No. 50, 99th Cong., 1st Sess. 25 (1985)).

Actually, to serve as an effective deterrent, a civil penalty must recover an amount beyond the economic benefit of noncompliance. If a penalty recovered merely required the polluter to disgorge the benefit it received from noncompliance, then from a purely economic standpoint, a discharger would be indifferent between spending the money necessary to achieve full compliance in a timely manner and ignoring the regulation and simply paying the civil penalty as a cost of doing business.[16] *See SPIRG v. Monsanto Co.*, 29 Env't Rep. Cas.

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[16]Of course, this analysis is somewhat imperfect because it assumes that all violators will be assessed an appropriate civil penalty -- *i.e.*, 100% enforcement. In reality, a violator's expected punishment would be reduced by a certain percentage to represent the proportion of violations that are either never prosecuted or not successfully prosecuted. The reality of imperfect enforcement suggests that civil penalties beyond the amount of the violator's economic benefit should be imposed so that dischargers do not simply gamble that they will not be caught. *See* Michael Levinson, Note, *Deterring Air Polluters Through Economically Efficient Sanctions: A Proposal for Amending the Clean Air Act*, 32 Stan. L. Rev. 807, 12-13 (1980):

> A firm deciding to violate . . . faces an "expected fine" equal to the potential fine discounted by the probability of detection and assessment . . . . In deciding whether to comply, the firm will balance against this cost the benefits that it expects to reap from noncompliance.
>
> Under the economic theory of deterrence the "optimal"-most efficient and effective-economic deterrent is the fine that when discounted by the probability of detection just equal the economic value of noncompliance.

(footnotes omitted).

This analysis also does not account for attorneys' fees or other costs necessary to defend against enforcement actions; nor does the analysis address a

(BNA) 1078, 1090 (D.N.J. 1988) ("To simply equalize the economic benefit with the penalty would serve ill the possibility of discouraging other and future violations. Some additional penalty should be imposed as a sanction.").

Removing a violator's economic benefit is central to the enforcement provisions of the CWA. The civil penalty provision in section 309(d) of the CWA, 33 U.S.C. § 1319(d), requires that the violator's economic benefit be considered in imposing civil penalties. Section 309(d) provides, in part:

> Any person who violates . . . any permit . . . issued under section 1342 of this title by the Administrator, or by a State . . . shall be subject to a civil penalty not to exceed $25,000 per day for each violation. In determining the amount of a civil penalty the court *shall* consider the seriousness of the violation or violations, *the economic benefit (if any) resulting from the violation*, any history of such violation, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require.

33 U.S.C. § 1319(d), (emphasis added).

Congress amended section 309(d) of the CWA in 1987 to add the list of factors, including economic benefit, that courts must consider in determining civil penalties. Water Quality Act of 1987, Pub. L. No. 100-4, sec. 313(c), § 309(d), 101 Stat. 7, 45 (codified at 33 U.S.C. § 1319(d)). Prior to 1987, section 309(d) provided for the imposition of civil penalties, but did not specifically list the factors that should be considered in determining the appropriate amount of the penalty. When

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polluter's loss of good will, or the stigma that attaches to a company that is fined for violating environmental laws.

Congress added these required factors, it adopted the factors that EPA had included in its policy guidelines for assessing penalties under the CWA. *Atlantic States Legal Found. v. Tyson Foods, Inc.*, 897 F.2d at 1142 n.23 ("It appears that Congress took note of the factors listed in the [EPA's penalty] policy when it amended 33 U.S.C. § 1319(d) to require courts to take account of certain specified factors when determining civil penalty awards.").

Under the EPA's 1978 penalty policy, removal of the violator's economic benefit derived from noncompliance was one of four factors to be considered in determining the amount of the penalty to be imposed. EPA, Civil Penalty Policy for Major Source Violators of Clean Air Act and Clean Water Act (Apr. 11, 1978), *reprinted in* Env't Rep. (BNA), Federal Laws 41:1101, 41:1104 (Apr. 27, 1979) (Pl. Ex. 106). The 1978 policy stated that removing the violator's economic benefit "will assure that violators of the law do not economically benefit from their violation [and] ... will assure that violators do not gain an economic advantage over others who incurred costs to obey the law." *Id.* at 41:1102.

Subsequent EPA penalty policies retained and reinforced the emphasis on the removal of the economic benefit of noncompliance. For example, the 1984 penalty policy provides that "it is Agency policy that penalties generally should, at a minimum, remove any significant economic benefits resulting from failure to comply with the law." Policy on Civil Penalties, EPA General Enforcement Policy #GM-21, at 3 (Feb. 16, 1984) (Pl. Ex. 108). Also, the 1986 penalty policy provides that "penalties should, at a minimum, recover the economic benefit of noncompliance," EPA's Clean Water Act Penalty Policy for Civil Settlement Negotiations 1 (Feb. 11, 1986), *reprinted in* 1 Env't Rep. (BNA), Federal Laws 21:911 (Pl. Ex. 109); and that "every reasonable effort shall be made to calculate and recover the economic benefit of noncompliance." *Id.* at 3. The 1986 penalty

policy requires that economic benefit be recovered in a settlement of a judicial action, except in "a limited number of cases" where the settlement amount may be reduced below the economic benefit "based upon a defendant's inability to pay or 'litigation practicalities.'"[17] *Id.*

As the Supreme Court has recognized, the "view of the agency charged with administering the statute is entitled to considerable deference." *Chemical Manufacturers Ass'n v. Natural Resources Defense Council, Inc.*, 470 U.S. 116, 125 (1985). Therefore, the EPA's policy that civil penalties must recover at least the amount of the violator's economic benefit of noncompliance suggests that a state enforcement agency's failure to do so is some evidence that the agency's prosecution was not diligent.

The NPDES Enforcement Agreement entered into between South Carolina and the EPA further demonstrates the importance of recovering economic benefit when the state assesses civil penalties. This agreement requires "the assessment of a civil penalty, when appropriate, based on consideration of established factors (or equivalent sanctions) as part of all civil judicial referrals." NPDES Enforcement Agreement-FY 92 Between the State of South Carolina and EPA, Region IV, at 13 (Apr. 28, 1992) (Pl. Ex. III). The established factors are listed in a footnote and include "the amount of economic benefit resulting from the violation." *Id.* at 13 n.*.

Moreover, DHEC's Uniform Enforcement Policy, which governs the agency's environmental enforcement

[17] Litigation practicalities include such factors as "the probability of proving questionable violations, the probability of acceptance of an untested legal construction," and equitable considerations, such as whether the defendant "reasonably, conclusively, and detrimentally" relied on EPA's representations or actions. *Id.* at 6. The Defendant has not contended that any of these factors were present in its settlement with DHEC.

procedures, states that the guidelines for civil penalty assessment are intended, *inter alia*, to "punish and deter future violations" and "to eliminate economic incentives for noncompliance." DHEC, Uniform Enforcement Policy, sec. III, ¶ 2 (Dec. 12, 1991) (Pl. Ex. 10). The guidelines provide that in assessing a penalty, DHEC may consider "any one or combination of the following factors:"

> (a) Degree of harm or potential harm to the public health, safety, or environment;
>
> (b) Extent of deviation from the requirements of the statute, regulation, standard or permit;
>
> (c) Frequency or duration of the violation. This may include multiple or multi-day violations;
>
> (d) Economic benefit as a result of noncompliance. This may include any evidence of economic advantage gained through noncompliance. In calculating economic benefit, enforcement staff may utilize the EPA computer model as appropriate;
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> (e) Cost of restoration of the environment or abatement of the environmental harm;
>
> (f) Past performance record or past history of violations;
>
> (g) Degree of willfulness and/or negligence;
>
> (h) Other pertinent factors that measure the seriousness or frequency of the violation or the conduct of the party.

Id. at 6.

Although neither DHEC's NPDES Enforcement Agreement with the EPA nor DHEC's Uniform Enforcement Policy explicitly requires DHEC to calculate economic benefit in every case, both documents illustrate the importance of

considering economic benefit when imposing civil penalties.

The Defendant vigorously argues that the alleged failure of DHEC's civil penalty to recover economic benefit does not evidence a lack of diligent prosecution. The Defendant concedes that the CWA requires the consideration of economic benefit when civil penalties are assessed in the following three circumstances: (1) an administrative enforcement action by the Administrator pursuant to section 309(g)[18]; (2) a judicial action in federal court by the Administrator pursuant to section 309(b)[19]; and (3) a citizen suit in federal court under section 505(a) that is not barred by the diligent prosecution limitation in section 505(b)(1)(B).[20] However, the Defendant asserts that nothing in the CWA requires a state agency, such as DHEC, which is delegated the authority under section 402(b) to administer the state's own NPDES program, to calculate a violator's economic benefit of noncompliance in a state judicial or administrative enforcement action.

The Defendant's argument misconstrues the nature of the precise issue presently before the court. The issue is not whether the Act explicitly *requires* the state enforcement agency to do anything; rather the issue is whether the state's failure to calculate economic benefit is evidence of non-diligent prosecution so that the citizen suit can proceed under section 505(b)(1)(B). The court agrees that no language in the CWA

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[18]Section 309(g)(3) provides that "[i]n determining the amount of any penalty assessed under this subsection, the Administrator . . . *shall* take into account [*inter alia*] economic benefit or savings (if any) resulting from the violation." 33 U.S.C. § 1319(g)(3).

[19]"Such action would be governed by section 309(d) discussed above. 33 U.S.C. § 1319(d).

[20]Section 505(a) provides that "[t]he district court shall have jurisdiction . . . to apply any appropriate civil penalties under section 309(d) of this title." 33 U.S.C. § 1365(a).

directly requires a state enforcement agency to calculate economic benefit when determining what an appropriate civil penalty should be. In other words, the CWA does not require states to replicate federal standards or procedures for assessing penalties under the state's water pollution control laws. However, if a state's enforcement mechanisms fail to meet the standard for diligent prosecution under section 505(b)(1)(B), then the state's action would not preclude a subsequent citizen suit under section 505(a) of the Act.

The Defendant also asserts that the diligence of DHEC's prosecution is demonstrated by the fact that the EPA did not overfile[21] in this case, nor has the EPA ever overfiled in a case in South Carolina where DHEC did not calculate economic benefit. This argument is fallacious, however, because the standard for when the EPA overfiles in a state enforcement action is not the same as the "diligent prosecution" standard under section 505(b)(1)(B) below which a citizen suit may proceed.

The regulations governing state NPDES programs provide, "A civil penalty assessed, sought, or agreed upon by the State Director under paragraph (a)(3) of this section shall be appropriate to the violation." 40 C.F.R. § 123.27(c). The note accompanying this particular subsection provides that "[t]o the extent that State judgments or settlements provide penalties in amounts which EPA believes to be substantially inadequate in comparison to the amounts which EPA would require under similar facts, EPA, when authorized by the applicable statute,

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[21]Under the Act, the EPA retains authority to enforce permits in states that administer their own delegated or approved NPDES programs. *See* 33 U.S.C. § 1342(i). Although a state has the primary responsibility for enforcing permits under its own program, the EPA may take action "principally where [the] State is 'unwilling or unable' to take 'timely and appropriate' enforcement action," EPA, Policy Framework for State EPA Enforcement Agreements 21 (Aug. 1986). The term "coverfiling" refers to the EPA's filing a federal enforcement action against a defendant that has been previously sued by a state for the same type of violations.

may commence separate actions for penalties." *Id.*, Note. Whether the amount of a state's penalty is "substantially inadequate" is not, however, the same inquiry as whether the state diligently prosecuted the violator for purposes of section 505(b)(1)(B).

Also, the EPA's decision not to file a separate action to recover additional penalties does not indicate that the penalty was adequate or that the state's prosecution was diligent. The CWA does not require the EPA to overfile a state enforcement action whenever the state assesses "substantially inadequate" civil penalties; rather, the Act gives the EPA the discretion to overfile in such cases. If the diligence of a state agency's prosecution in a particular case were established by the fact the EPA did not elect to overfile in that case, then the citizen suit provisions of the CWA would be rendered meaningless. Under the Defendant's theory, a citizen could never bring a private enforcement suit that challenged the adequacy of a state prosecution: If the EPA did not overfile, the citizen would be barred by the diligent prosecution standard of section 505(b)(1)(B); and if the EPA did overfile, there would presumably be no need for the citizen to bring a private action. Clearly Congress did not intend for the EPA's oversight authority to subsume the oversight authority given to private citizens through the citizen suit provisions of the Act.

The primary purpose of citizen suits is to allow private persons to take action to enforce the law when the EPA or the state, or both, have failed to do so adequately. *See* S. Rep. No. 414, *supra*, at 80, *reprinted in* 1972 U.S.C.C.A.N. at 3746 "[I]f the court viewed the agency action as inadequate, it would have jurisdiction to consider the citizen action notwithstanding any pending agency action."; 118 Cong. Rec. 33,716 (Oct. 4, 1972) (statement of Sen. Bayh), *reprinted in* Senate Comm. of Public Works, 93d Cong., 1st Sess., *Legislative History of the Water Pollution Control Act Amendments of 1972*, at 217 (Comm. Print 1973) [hereinafter *"CWA Legislative History"*] ("Citizen

suits . . . can be a very important tool for keeping industry and Government alike from letting standards and enforcement slip."). As the Department of Justice states in its brief as *amicus curiae*, "Inaction by the state or federal government is not a justification for dismissing a citizen suit; instead, it is the principal justification for allowing such a suit to go forward."

The Defendant next argues that the EPA has tacitly sanctioned DHEC's failure to consider economic benefit when assessing civil penalties, because EPA has not withdrawn the state's authority to operate its own NPDES program. This argument is also fallacious because the criteria for withdrawing a state's authority to administer its own NPDES program are not the same as the criteria for allowing citizens under section 505(b)(1)(B) to "overfile" a state enforcement proceeding. Withdrawal of a state's authority to administer its NPDES program is a drastic remedy that the EPA would not, and should not, undertake lightly. *See* 118 Cong. Rec. 10,241 (Mar. 27, 1982) (Statement of Rep. Reuss), *reprinted in CWA Legislative History*, *supra*, at 452 "[A] total takeover [by the EPA of a state NPDES program] would result in chaos both at the State and Federal level. It should be exercised only when there is clear evidence that the entire State program has fallen into disrepair."); *see also Sierra Club v. SCM Corp.*, 572 F. Supp. 828, 830 n.1 (W.D.N.Y. 1983) (rejecting defendant's argument that the citizen "plaintiffs' exclusive remedy for the apparent lack of public participation in the [state agency's] administrative proceedings is to petition the Federal Government to withdraw its approval of the New York State enforcement program for failure to comply with the Federal Requirements and Standards").

During the hearing on this matter, as well as in its briefs submitted in this case, the Defendant repeatedly remarked that the 1.3 ppb mercury limit was overly stringent and that the Defendant, at all times, proceeded reasonably and in good faith in attempting to comply with the limit. These arguments do not,

however, require the court to dismiss the Plaintiffs' citizen suit.

This court is not the appropriate forum for the Defendant to challenge the propriety of the effluent limits in its NPDES permit. The Defendant's attack on its permit's mercury limit should be, or should have been, raised in a direct appeal of the permit or in a request for a site-specific variance from the permit; it should not be raised in this action.

In addition, under the Clean Water Act a violation of an NPDES permit is a strict liability offense. *Eg., Stoddard v. Western Carolina Regional Sewer Authority*, 784 F.2d 1200, 1208 (4th Cir. 1986); *PIRG v. Elf Atochem North America, Inc.*, 817 F. Supp. 1164, 1178 (D.N.J. 1993); *United States v. CPS Chem. Co.*, 779 F. Supp. 437, 442 (E.D. Ark. 1991). Thus, the reasonableness or *bonafides* of an alleged violator's efforts to comply with its permit is not relevant in determining whether a violator is liable under the Act. *See United States v. Ohio Edison Co.*, 725 F. Supp. 928, 934 (N.D. Ohio 1989).[22]

At the hearing, the Defendant also argued that the amount of the fine imposed against Laidlaw is itself evidence of diligent prosecution because it was the third or fourth most severe penalty for a water pollution violation in DHEC history. This argument is also unavailing because the history of civil penalties imposed by DHEC is irrelevant to the issues presently before the court. If DHEC's method for calculating civil penalties is inadequate because it does not ensure the recovery of the violator's economic benefit, then a comparison to past DHEC penalties certainly cannot show diligence.[23]

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[22]Of course, a violator's good-faith efforts to comply with the applicable requirements may be considered as a factor in determining the appropriate amount of a civil-penalty). 33 U.S.C. § 1319(d).

[23]The Defendant further argued that DHEC's diligence is demonstrated by the fact that DHEC's average penalty for an NPDES violation is one of the highest averages among the state agencies in the southeastern United States that operate

Finally, the Defendant argues that this court should not require DHEC to calculate economic benefit in every case because the agency simply does not have the resources to make such calculations. However, this argument actually supports rather than rebuts the Plaintiffs' argument that DHEC's failure to recover economic benefit demonstrates the agency's lack of diligent prosecution against Laidlaw. If a state agency does not have the resources to adequately enforce permits under its NPDES program by ensuring that violators of the permits do not benefit from noncompliance, then private citizens should be

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averages among the state agencies in the southeastern United States that operate their own NPDES programs. The Defendant stated that if DHEC's enforcement efforts were any more diligent, or more stringent, then industry would leave South Carolina in favor of other states with more relaxed environmental enforcement.

This is an improper argument to make before this court. The court's sworn duty is to apply the laws as written by Congress.

The legislative history of the Clean Water Act indicates that the drafters of the Act debated the potential problem that some states might loosen their environmental standards to attract industry and jobs. However, the solution to such a problem is uniform federal enforcement of the Act. *See* 118 Cong. Rec. 10,241 (Mar. 27, 1972) (statement of Rep. Reuss), *reprinted in CWA Legislative History, supra*, at 452:

> "[T]he greatest political barrier to effective pollution control . . . is the threat of our worst polluters to move their factories out of any state that seriously tries to protect its environment. It is the practice of playing off one State against the other. It is the false but strident cry of the polluter that clean air and clean water mean fewer jobs.
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> . . . .
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> . . . [T]he answer to threats is uniformity. The only way to stop polluters from political intimidation is to prevent them from raising the alternative of moving to a place where pollution is allowed. There should be no such place in this country. We can no longer tolerate the fact that the price of diligence is intimidation. We should have uniform standards of pollution control in all fifty States-tough standards, fair standards, a set of meaningful and comprehensive rules that permit neither exception nor evasion. Pollution does not stop at State boundaries and neither must its regulation."

(quoting testimony of then Governor Wendell R. Anderson of Minnesota before the House Public Works Committee (Dec. 9, 1971)).

able to assist enforcement efforts by bringing a citizen suit. As the Eighth Circuit has recognized, "agency inaction is precisely the circumstance in which private action is appropriate." *United States EPA v. City of Green Forest, Ark.*, 921 F.2d 1394, 1405 (8th Cir. 1990), *cert. denied*, 502 U.S. 956 (1991) (citing *SPIRG v. Georgia-Pacific Corp.*, 615 F. Supp. 1419, 1427 (D.N.J. 1985) ("Defendant's interpretation of the Act would render citizen suits impossible when they are required most: instances where an agency encourages a polluter to believe its unlawful behavior will go unpunished.")).

Furthermore, were this court to rule that DHEC's failure to consider Laidlaw's economic benefit of noncompliance is evidence of non-diligent prosecution, the court would not be requiring DHEC to calculate economic benefit in future enforcement actions. If DHEC continues not to perform such a calculation in assessing civil penalties, however, a judicial enforcement action by DHEC might not be considered diligent under section 505(b)(1)(B) so as to preclude a citizen suit. In making such a conclusion, the court would not be condemning or invalidating the state's enforcement procedures; rather, the court would merely be allowing the citizen suit to supplement the state's enforcement efforts-exactly what Congress envisioned the role of the citizen suit to be.

Accordingly, the court determines that because recoupment of a violator's economic benefit of noncompliance is central to the enforcement of the CWA, the failure of the state enforcement agency to recover, or even to determine, a violator's economic benefit is strong evidence that the agency's prosecution of that violator was not diligent for purposes of section 505(b)(1)(B) of the CWA.

The determination of economic benefit is susceptible to several different methods of calculation. As the Third Circuit court of Appeals observed, "Precise economic benefit to a polluter may be difficult to prove. The Senate Report accompanying the 1987 amendment that added the economic

benefit factor to section 309(d) recognized that a reasonable approximation of economic benefit is sufficient to meet the plaintiff's burden on this factor." *PIRG v. Powell Duffryn Terminals Inc.*, 913 F.2d 64, 80 (3d Cir. 1990), *cert. denied*, 498 U.S. 1109 (1991). Specifically, the Senate Report provides that "[t]he determination of economic benefit or other factors will not require an elaborate or burdensome evidentiary showing. Reasonable approximations of economic benefit will suffice." S. Rep. No. 50, 99th Cong., 1st Sess. 25 (1985).

The court determines that the methodology suggested by Dr. Kavanaugh--the capital-asset pricing model--is a reasonable method of calculating the Defendant's economic benefit of noncompliance. *See Atlantic States Legal Found. v. Universal Tool & Stamping Co.*, 786 F. Supp. 743, 751 (N.D. Ind. 1992) (using defendant's average return on equity of 16.1% to calculate the economic benefit of delayed installation of equipment for four years). An equity rate, such as that employed by the capital-asset pricing model, provides the best approximation of the return the violator could have earned by delaying or avoiding expenses that are necessary for compliance with its permit.

As noted earlier, the court declines, in this order, to make a specific finding on the precise amount of the Defendant's economic benefit of noncompliance.[24] For purposes of the matter presently before the court, however, the court finds that the economic benefit substantially exceeds the $100,000 fine imposed by DHEC and that DHEC's penalty therefore failed to recover the Defendant's economic benefit of noncompliance.

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[24]Of course, if the Plaintiffs ultimately succeed on the merits of their citizen suit, the court is required by sections 505(a) and 309(d) of the Act to include a calculation of economic benefit, as well as the other statutory factors, in assessing an appropriate civil penalty. 33 U.S.C. § 1365(a).

IV. CONCLUSION

For all of the foregoing reasons, the court concludes that DHEC's lawsuit against Laidlaw, which was filed in South Carolina state court on June 9, 1992 and settled by consent order on June 10, 1992, does not constitute diligent prosecution under section 505(b)(1)(B) of the Clean Water Act. Therefore, the Plaintiffs' citizen suit, which was filed on June 12, 1992, is not barred by the state agency's prior judicial enforcement action.

The court's conclusion that DHEC's action against Laidlaw was not "diligent prosecution" as that term is used in section 505(b)(1)(B) of the Act is not intended, nor should it be interpreted, to cast any aspersions on DHEC's enforcement personnel. The court recognizes that DHEC is responsible for monitoring many aspects of the health and welfare of the citizens of South Carolina and that the agency must fulfill its duties with limited resources. The citizen suit provision of the Clean Water Act, like similar provisions in other environmental statutes, is intended to allow private citizens to supplement enforcement efforts whenever the governmental agencies, because of a lack of resources or some other reason, cannot or do not adequately enforce environmental standards.

The effect of the court's present ruling is merely to allow the Plaintiffs' citizen suit to proceed beyond the threshold limitation of section 505(b)(1)(B). This order does not address the merits of the Plaintiffs' action.

The court will issue a separate scheduling order, contemporaneously with this order, to establish a deadline for substantive motions and a trial date for the remaining issues in the case.

IT IS SO ORDERED.

Joseph F. Anderson, Jr.
United States District Judge

April 7, 1995
Columbia, South Carolina

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Friends of the Earth, Inc., Citizens Local Environmental Action Network, Inc., and Sierra Club,	)	
	)	C/A No. 3:92-1697-17
Plaintiffs,	)	
	)	FINDINGS OF FACT,
v.	)	
	)	CONCLUSIONS OF LAW,
Laidlaw Environmental Services (TOC), Inc.,	)	
	)	AND ORDER
Defendant.	)	

This is an action brought pursuant to the citizen suit provision in Section 505 of the Federal Water Pollution Control Act Amendments of 1972, commonly known as the Clean Water Act, 33 U.S.C. § 1365. In their amended complaint, plaintiffs, Friends of the Earth ("FOE") and Citizens Local Environmental Action Network, Inc. ("CLEAN"), seek declaratory and injunctive relief, civil penalties, costs, and attorneys' fees from the defendant, Laidlaw Environmental Services (TOC), Inc. ("Laidlaw").

I.
INTRODUCTION

The Roebuck Plant and the 1987 Permit

Laidlaw owns and operates a hazardous waste incinerator located in Roebuck, South Carolina. As part of that facility, Laidlaw maintains a wastewater treatment plant for water used in air pollution control devices for the incinerator. Laidlaw discharges the treated wastewater into the North Tyger River pursuant to a National Pollutant Discharge Elimination System ("NPDES") permit issued by the South Carolina Department of Health and Environmental Control ("DHEC").

Plaintiffs FOE and CLEAN initiated this action on June

12, 1992[1]. On July 1, 1992, Laidlaw moved to dismiss the plaintiffs' action, arguing that this citizen suit was barred by Section 505(b)(1)(B) of the Act, because DHEC had previously brought a lawsuit against Laidlaw for the same alleged violations of its permit. The plaintiffs responded by arguing that DHEC's lawsuit did not preclude the citizen suit because, *inter alia*, DHEC did not "diligently prosecute" its action against Laidlaw.

In its Order dated December 14, 1992, the court initially denied Laidlaw's Motion to Dismiss and ordered that an evidentiary hearing be held on the issue of whether plaintiffs' citizen suit could proceed. The court received a total of seven days of testimony on this matter in October, November, and December of 1993. In a subsequent memorandum opinion and order, this court held that DHEC's civil action against Laidlaw had not been diligently prosecuted and, as a result, allowed plaintiffs' lawsuit to proceed. *Friends of the Earth v. Laidlaw Environmental Services (TOC), Inc.*, 890 F. Supp. 470 (D. S. C. 1995).

In May 1995, the parties filed cross-motions for summary judgment. In addition, Laidlaw, with support from various *amicus curiae*, requested that this court either reconsider its ruling that DHEC's prosecution was not diligent or certify this question to the Fourth Circuit Court of Appeals. On June 27, 1995, the court denied Laidlaw's Motion for Reconsideration or Certification, denied plaintiffs' Motion for Partial Summary Judgment and granted, in part, Laidlaw's Motion for Summary Judgment. As to Laidlaw's summary judgment motion, the court held that plaintiffs' allegations of effluent discharge violations other than mercury were barred under *Gwaltney v. Chesapeake Bay Found., Inc.*, 484 U.

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[1] At a hearing held on November 19, 1992, the Court granted plaintiffs' oral motion to join the Sierra Club as an additional plaintiff pursuant to Fed. R. Civ. P. 21.

S. 49 (1987), as they were not ongoing at the time the lawsuit was filed.

This court is authorized to decide this case on the merits pursuant to Section 505 of the Act, 33 U. S. C. § 1365. The court may use its equitable powers to enforce effluent standards or limitations and may impose an appropriate penalty, if any, in addition to the $100,000 penalty previously assessed against defendant in the DHEC lawsuit.

This case was tried before the court on July 31, 1995, through August 2, 1995. After the trial, this court held its decision in abeyance because a pending proceeding before a state Administrative Law Judge (regarding a change in the permit at issue in this case) could conceivably have an impact on this court's decision. When the ALJ's decision contained a finding that appeared to be at odds with some of the evidence in this case, this court, *sua sponte*, reopened the record in this case so as to receive additional evidence on what appears to be a critical issue. The parties engaged in brief discovery on this issue and then advised the court that it would not be necessary to conduct an additional evidentiary hearing because the discovery had resulted in a stipulation by the parties on this issue. Accordingly, the stipulation was added to the record in this case. *See* Stipulation and Order dated December 20, 1996.

After receiving the testimony, carefully considering all the evidence, weighing the credibility of the witnesses, reviewing the exhibits and briefs, and studying the applicable law, this court makes the following Findings of Fact and Conclusions of Law pursuant to Fed. R. Civ. P. 52. The court notes that to the extent any of the following Findings of Fact constitute Conclusions of Law, they are adopted as such, and to the extent any Conclusions of Law constitute Findings of Fact, they are so adopted.

II.
FINDINGS OF FACT[2]

The plaintiffs are non-profit corporations which bring this action on behalf of their members to protect their environmental, health, economic, recreational, and aesthetic interests in the quality of the North Tyger River and waters downstream.

The defendant is a South Carolina corporation which owns and operates a hazardous waste incinerator (hereinafter "the facility") in Roebuck, Spartanburg County, South Carolina. As part of the facility, Laidlaw operates a wastewater treatment plant to treat water from the air pollution control system which is associated with the incineration process. The treated wastewater is discharged into the North Tyger River.

Laidlaw purchased the facility from ABCO Industries, Inc. ("ABCO") in early 1986. During the balance of 1986, Laidlaw did not operate under its own NPDES permit; rather, the facility operated temporarily under the permit that had been issued to ABCO.

On December 15, 1986, pursuant to Section 402 of the Clean Water Act, 33 U. S. C. Section 1342, DHEC issued to Laidlaw NPDES Permit No. SC0040517, effective January 1, 1987 ("the 1987 Permit"), for the facility's wastewater treatment plant. The permit authorized Laidlaw to discharge limited quantities of pollutants into the North Tyger River in accordance with the conditions set forth in the permit. The permit limited Laidlaw's discharge of antimony, arsenic, cadmium, chromium, copper, lead, mercury, nickel, total organic carbon, total dissolved solids, total suspended solids,

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[2] Many of the preliminary findings of fact contained in this opinion have already been recited in the court's April 7, 1995 order allowing this suit to go forward. They are repeated here because they relate to the merits of the case as well.

and zinc. The permit also regulated the flow, temperature, toxicity, and pH of the effluent from the facility. In addition, the permit imposed monitoring and reporting obligations, such as the requirement to maintain discharge monitoring reports ("DMRs") and laboratory reports.

Several of the effluent limits contained in Laidlaw's 1987 Permit were more stringent than those under ABCO's permit. The most significant reduction was in the mercury limit, which DHEC proposed to reduce from 20 parts per billion (ppb) under ABCO's permit to 1. 3 ppb in the 1987 permit. The basis of this reduction was DHEC's use of the recently promulgated EPA 1986 Quality Criteria for Water, commonly referred to as the Gold Book.

Because Laidlaw's permit contained such a drastic reduction in the mercury limit, DHEC took two additional steps concerning the reduction. First, it imposed an interim limit of 10 ppb from January 1, 1987, to December 31, 1987. The limit decreased to 1. 3 ppb on January 1, 1988. In connection with the interim limit, DHEC directed, in the permit, that Laidlaw conduct a feasibility study by March 31, 1987, of installed and available mercury removal systems to determine whether the mercury limit of 1. 3 ppb could be satisfied[3].

Second, DHEC included a reopener clause in the 1986 Permit that would have allowed Laidlaw to petition for a higher mercury limit once the company had investigated and installed the best available technology in the attempt to achieve 1. 3

[3] The language of the 1987 Permit requiring a feasibility study reads as follows:

> The Permittee shall conduct a study of installed and available mercury systems to determine the feasibility of achieving the mercury limit on page 3 of this permit. A report of the study shall be submitted on March 31, 1987.

ppb[4]. The reason for including this reopener was that DHEC was uncertain whether any technology existed that would allow Laidlaw to comply with a daily maximum limit of 1. 3 ppb.

In August 1986, prior to the issuance of a permit to Laidlaw by DHEC, Laidlaw contacted Environmental Technology Engineering, Inc. ("ETE"), an environmental consulting firm, for the purpose of conducting the above referenced feasibility study. This study was completed and submitted to DHEC in accordance with the permit. In this study, ETE concluded that removal of mercury to 1. 3 ppb was an "extremely difficult and complex problem," inasmuch as all available manufacturer's information and reliable equipment on the market at that time demonstrated that current technology was capable of reducing mercury only down to a range of 2 ppb to 5 ppb.

As part of the feasibility study, ETE evaluated eight possible technologies, and ultimately narrowed the focus to two technologies, activated carbon and ion exchange, for bench and pilot scale testing. The actual testing of these technologies, which was done in accordance with accepted engineering practices, was conducted between June and December 1987.

Based on ETE's bench and pilot scale testing, the consulting firm concluded that a second carbon adsorption unit, to be run in series with Laidlaw's existing carbon unit, would enable Laidlaw to meet the 1. 3 ppb mercury limit. Even though ETE's recommendations to this effect were not finalized until December, 1987, promising results of early testing of this technology motivated Laidlaw to begin work on the second

[4] The "re-opener" clause of the 1987 Permit reads as follows:

> Upon submittal of the report on mercury removal called for in the schedule of compliance and if requested by the Permittee, the mercury limit on page 3 of this permit may be reconsidered.

carbon adsorption unit in 1987. Accordingly, Laidlaw received a permit for construction of the second carbon unit in February, 1987, and constructed the unit during the remainder of that year.

In early 1988, Laidlaw began operation of the second carbon adsorption unit. Because of ETE's recommendation that this technology would enable Laidlaw to meet the 1. 3 ppb mercury limit, Laidlaw chose not to exercise its option under the permit of petitioning for a higher mercury limit at that time.

Despite ETE's testing, the additional carbon unit did not allow Laidlaw's facility consistently to achieve the 1. 3 ppb mercury limit. As a result, in September 1988, DHEC and Laidlaw entered into a consent order, in response to which Laidlaw contracted with RMT, Inc. , a second environmental consulting firm, to fully re-evaluate the facility's wastewater treatment system and to make recommendations for correcting the problems Laidlaw was continuing to have with excursions of mercury and other metals. During the latter part of 1988, RMT investigated four conceptual approaches to treating the effluent from Laidlaw's facility. In December 1988, RMT submitted a preliminary engineering report to DHEC recommending the testing of three metals removal systems. These systems, trade named Unipure, Lancy and Memtek, each employed a different technology for metals removal.

During 1989, Laidlaw and RMT conducted bench and pilot testing on the Lancy, Unipure and Memtek wastewater treatment systems. The proposed schedule for completion of these studies was discussed with DHEC officials Mike Young and Andy Yasinsac. DHEC thereafter gave written approval of the pilot studies schedule. Also during 1989, Laidlaw applied for and received approval from DHEC to replace its two existing cooling towers with a single, more advanced cooling system. The purpose of this change was to eliminate occasional temperature excursions that Laidlaw experienced during the summer months.

On December 28, 1989, Laidlaw submitted the results of RMT's pilot testing to DHEC. Laidlaw, thereafter, selected the Lancy system and requested approval from DHEC for its installation. DHEC approved Laidlaw's request and issued the required construction permit on July 10, 1990. The manufacturer of the Lancy system (U. S. Filter[5]) gave Laidlaw a conditional guarantee that the system would enable Laidlaw to comply with the mercury limit.

During the latter half of 1990 and the first two months of 1991, the Lancy system was constructed and installed at Laidlaw's facility. This installation work was performed in accordance with the compliance schedule submitted to and approved by DHEC. Between February and July, 1991, Laidlaw began full scale operation of the Lancy system and engaged in "debugging" activities related to its full implementation. During this period, all remaining pH problems were solved and the system effectively removed all metals to NPDES limits with the exception of mercury.

In responding to the continuing problems with mercury, Laidlaw worked both with DHEC and Lancy to make operational adjustments to the system in an effort to achieve compliance with the mercury limit. When it was ultimately determined that mercury excursions were continuing to occur, Laidlaw put pressure on U. S. Filter, the manufacturer of the Lancy system to correct the problem. U. S. Filter responded by recommending numerous testing procedures, including the addition of varying amounts of iron sulfate, copper sulfate, and free sulfide. These tests were unsuccessful, however, in reducing the mercury content below

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[5] During the course of its dealings with Laidlaw, the vendor of the Lancy system has changed its name several times. The company is currently known as U. S. Filter. For ease of reference, that name is used throughout this opinion.

the NPDES limit. U. S. Filter thereafter determined that achieving the 1. 3 ppb limit was problematic because it appeared that the level of metals being introduced to the wastewater treatment system was simply too low for the system to work effectively on mercury[6].

Laidlaw eventually requested relief from the draconian limits of the 1987 Permit, but not until June 26, 1991, when it requested a higher site specific mercury limitation. The request was based on the proposition that the 1. 3 ppb mercury limit was a water-quality based limitation that was not needed to meet the water-quality standards of the Tyger River. This request, therefore, was not made pursuant to the reopener clause of the 1987 Permit, which allowed for reconsideration of the mercury limit based on technology considerations. Laidlaw abandoned the June 26, 1991 water quality-based request after DHEC rejected the fish study that defendant had submitted in support of its request as inconclusive.

DHEC enforcement officials began preparation of a fact sheet to initiate enforcement action in early 1992, after a series of abnormally high mercury excursions occurred at the facility in December 1991. In May 1992, DHEC served a formal enforcement document on Laidlaw regarding the facility's continued mercury excursions.

On June 5, 1992, DHEC held an enforcement conference with Laidlaw. Subsequent meetings and telephone conferences to negotiate a consent agreement occurred later in the day on June 5, 1992, as well as on June 8, 1992. The parties reached a final consent agreement on June 9, 1992, and a judicial complaint was filed in the Court of Common Pleas in Spartanburg County, South Carolina on that date. On June 10, 1992, a state circuit judge approved the

[6] As discussed later in this section, the metal mix and total metal level impacts the effectiveness of the system due to certain chemical interactions.

settlement of the DHEC lawsuit.

After the consent order was entered, Laidlaw continued to explore additional technologies to remedy its continuing mercury problems. Laidlaw experimented with various operational changes to the system and performed tests utilizing chemicals and technologies both recommended by its consultants and developed internally by Laidlaw personnel. As the mercury problems continued to be investigated, Laidlaw had to shut down the incinerator altogether for substantial periods of time in 1992, in an effort not to violate either its mercury parameter or the judicial consent order then in effect.

The solution to meeting the 1.3 ppb limit was ultimately achieved by Laidlaw personnel through experimentation utilizing activated carbon, micro-filtration, and ion exchange. Laidlaw discovered, subsequent to June 1992, that adding activated carbon filters to the end of the Lancy system effectively reduced the mercury level below 1.3 ppb, so long as Laidlaw severely limited the feed rate of mercury containing waste into the incinerator.

Although it was initially believed that micro-filtration and ion exchange were necessary to sustain compliance with permit levels, testing revealed that these technologies did not improve the efficiency of mercury removal and they were ultimately abandoned. The addition of carbon adsorption technology to the end of the Lancy unit has enabled Laidlaw to consistently achieve compliance with all of the parameters contained in its NPDES permit, and, following an extended period of demonstrated full compliance, DHEC agreed to allow the judicial consent order to expire. DHEC so notified the state court in a letter dated August 6, 1993, from DHEC attorney William Ready to the Spartanburg, South Carolina Circuit Court. On August 17, 1993, the state court entered an order of final judgment bringing the state lawsuit to an end.

The 1993 and 1994 Permits

On December 31, 1991, Laidlaw initiated efforts to renew the 1987 Permit and to amend the permit limit for mercury excursions. As a result of these efforts, DHEC issued a new permit ("the 1993 Permit") setting forth new and corrected permit limits for a number of constituents, including mercury.

Like the 1986 Permit, the 1993 Permit contained only a daily limit, not a monthly average, for mercury. Laidlaw appealed the conditions of the 1993 Permit, contending that the limits in the permit had been calculated incorrectly. DHEC thereupon agreed to reissue the permit (now known as the 1994 Permit) so as to provide a new daily maximum of 10 ppb and a monthly average of 1.25 ppb for mercury. The reason for two permit limits is that the Clean Water Act regulations had been amended since the 1987 Permit was issued so as to require that NPDES permits address both the acute (short term) and chronic (long term) impacts of discharges on the receiving water body. This is accomplished by a daily maximum[7] limit (to control the acute impact) and a monthly average[8] limit (to control the chronic impact). DHEC records show that the daily maximum *could have* been set as high as 200 ppb under the EPA Gold Book criteria, but DHEC set the limit at 10 ppb based on Laidlaw's previously demonstrated ability to achieve such a limit.

The 1994 Permit, therefore, significantly altered

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[7] A daily maximum limit is, as the term suggests, the maximum amount permitted on a given day.

[8] The term "monthly average" is somewhat misleading. A monthly average of a substance reflects the average amount of the substance discharged per day, based on an average of measurements taken for that substance over the course of a month.

Laidlaw's discharge obligations in two respects: It established a monthly average where none had existed before, and it increased the daily maximum to more than seven times what it had been previously.

FOE and CLEAN challenged DHEC's relaxing of the permit limits, filing a Petition for Administrative Review with Chief Administrative Law Judge Marvin F. Kittrell. In their appeal, the petitioners alleged that the daily maximum limit for mercury in the 1994 Permit violated the general "anti-backsliding"[9] rule because the limit was higher than the limit in Laidlaw's 1987 Permit. The appeal to Judge Kittrell was pending when this court conducted its July 1995 trial.

Because a final decision on the new permit could possibly impact on the remedial aspects of this case, the court announced at the conclusion of the July 1995 trial that it would reserve final judgment on the merits of this case until Judge Kittrell decided the appeal. On January 25, 1996, Judge Kittrell upheld the 1994 Permit, thus approving the higher limits for mercury. In doing so, Judge Kittrell found that several exceptions to the anti-backsliding rule had been demonstrated.

On May 9, 1996, Judge Kittrell's decision was affirmed by the DHEC Board by a 4-3 vote. The plaintiffs have appealed the DHEC decision to the South Carolina Circuit (trial) court, and, have indicated they will, if necessary, appeal to the South Carolina Supreme Court. [10]

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[9] Backsliding means the issuing of a permit with less stringent limits than the limits imposed by a previous permit. There are several federal and state regulations prohibiting backsliding, *e. g.* 40 C. F. R. § 122. 44(1)(1994); S. C. Code Regs. 61-9. 122. 44(1)(Supp. 1995), and there are several exceptions to the anti-backsliding rules. These exceptions are set forth in detail in the ALJ's order.

[10] The new permit limits went into effect on June 1, 1996 and will remain in

Not surprisingly, the parties disagree over whether certain findings by Judge Kittrell are binding on this court. Laidlaw argues that this court is bound by certain factual findings made by Judge Kittrell and relied upon by him in approving the higher limits. Plaintiffs contend that this court is not bound by these findings, relying primarily upon the argument that the issues before Judge Kittrell were different. Plaintiffs also argue that some of the factual findings on which Laidlaw relies were not necessary to support Judge Kittrell's decision, which ultimately rested on several different legal theories.

This court need not wade into this thicket. With regard to two of Judge Kittrell's findings relied upon by the defendant (Laidlaw's good faith and lack of harm to the environment), the record before this court leads to findings not inconsistent with those of Judge Kittrell. Accordingly, as to these two issues this court will make its own findings, on the record before it, without affording collateral estoppel effect to the findings of the Administrative Law Judge.

The third component of Judge Kittrell's order that Laidlaw seeks to rely upon in this case relates to the finding that the 1993 Permit erroneously used the chronic value for mercury contained in the EPA Gold Book to derive a daily maximum, or acute, limitation. This error was corrected when the 1994 Permit was issued by DHEC: the Gold Book acute and chronic values were used to establish daily maximum and monthly average mercury discharge limits. Judge Kittrell agreed with Laidlaw that the 1993 Permit was issued in error and that the 1994 Permit corrected the problem.

In this case, Laidlaw seeks to build upon Judge Kittrell's finding that the 1993 Permit was issued incorrectly.

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effect unless plaintiffs are able to convince a circuit judge to award them temporary injunctive relief pending resolution of their appeal.

Laidlaw seeks to have this court conclude that the 1987 Permit was issued incorrectly for the same reasons the 1993 Permit was issued incorrectly. That is to say, DHEC misapplied the Gold Book in Laidlaw's 1986 Permit by deriving the daily maximum limit from the chronic rather than the acute value for mercury.

Laidlaw's argument in this regard fails for two reasons. First, it is well-settled that a NPDES permit holder may not challenge the validity of the permit in an enforcement proceeding. Section 509(b)(2) provides that the terms of a permit "shall not be subject to judicial review in any civil or criminal proceeding for enforcement." 33 U. S. C. 1369(b)(2). This section, therefore, prohibits this court from considering whether defendant's 1. 3 ppb maximum mercury limitation is erroneous in terms of the liability to be found. In enacting this section, Congress intended to preclude untimely challenges to permit requirements in enforcement proceedings. The Senate Report stated:

> An alleged violation of an effluent control limitation or standard, would not require reanalysis of technological [or] other considerations at the enforcement stage. These matters will have been settled in the administrative procedure leading to the establishment of such effluent control provision.
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> * * *
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> Consequently, the factual basis for enforcement of requirements would be available at the time enforcement is sought, and the issue before the courts would be a factual one of whether there had been compliance.

S. Rep. No. 414, 92d Cong. , 1st Sess. 79-80 (1971), reprinted in A Legislative History of the Water Pollution Control Act Amendments of 1972, 93d Cong. , 1st Sess. , vol. 2 (1973)(hereafter "Legis. Hist. "), pp. 1497-1498, also reprinted in 1972 U. S. Code Cong. & Ad. News 3745-3746.

The Senate Report also stated:

> One purpose of these new requirements is to avoid the necessity of lengthy fact finding, investigations and negotiations at the time of enforcement. * * * [T]he threat of sanction must be real, and enforcement provisions must be swift and direct.

S. Rep. No. 414, *supra*, pp. 64-65, 2 Legis. Hist. at 1482-1483, 1972 U. S. Code Cong. & Ad. News at 3730-3731.

Defendant's remedy, if it believed that its 1987 Permit was invalid for any reason, was to seek an administrative adjudication pursuant to South Carolina law. South Carolina law provided defendant with the opportunity to challenge its permit in an administrative proceeding (S. C. Code of Laws, Volume 25, Regulation 61-72) and to have the administrative determination reviewed by a state court (S. C. Code Ann. 1-23-380 (Law. Co-op. 1995)). Defendant never pursued this remedy.

The second reason that Judge Kittrell's analysis of the 1993 Permit does not impact upon the 1987 Permit lies in the fact that, as Judge Kittrell himself acknowledged, DHEC was under no legal obligation to establish a monthly average limitation in the 1987 Permit, or even to use the Gold Book's acute value for mercury to establish a daily maximum limit. This is, quite simply, because the regulations governing such permits were different in 1986.

The decision by Judge Kittrell to approve a monthly

average and a higher daily maximum for the renewed permit does, however, have significant ramifications for this case. First, the new limits are important in determining whether any injunctive relief should be awarded. Second, the fact that the daily maximum (10 ppb) is now over seven times the old 1. 3 ppb limit of the 1987 Permit (and indeed could have been as high as 200 ppb but for Laidlaw's demonstrated ability to reduce its mercury effluent to levels substantially below 200 ppb) will impact on the penalty imposed in this case.

Laidlaw's Compliance Efforts

Regarding the issue of good faith compliance, plaintiffs contend that Laidlaw did not act in good faith in obtaining adequate pollution control equipment and failed to exercise proper operational controls during the time that the mercury excursions were occurring. Plaintiffs contend that Laidlaw should have purchased the Memtek System rather than the Lancy Wastewater Treatment System. They argue that Lancy was selected because it was less expensive than Memtek and they also point out that Memtek was willing to provide a stronger guarantee regarding the mercury limit. Plaintiffs also contend that Laidlaw could have simply restricted its feed rate of mercury in order to achieve compliance with the 1. 3 ppb limit and that, by not so doing, demonstrated a disregard for its permit limits.

Although the facts in this case disclosed that Lancy was somewhat less expensive than Memtek and its guarantee was somewhat more conditional than Memtek's guarantee, the court determines that the decision to purchase the Lancy system was reasonable under the circumstances. Specifically, DHEC was involved with Laidlaw and its consultants in the process of developing and approving the Lancy treatment technology and both Laidlaw and the manufacturer of the Lancy system (U. S. Filter) believed that the treatment technology employed would

be sufficient to meet the 1.3 ppb limit.

Memtek guaranteed that its system would allow Laidlaw to comply with the 1.3 ppb mercury limit. U.S. Filter initially guaranteed that the Lancy system would allow Laidlaw to comply with "most" of its permit limits. However, U. S. Filter told Laidlaw that "[w]hile the pilot tests results on mercury removal were encouraging, the limit is so low that we cannot at this time guarantee that the 1.3 ppb limit can be met." After additional treatability studies, U.S. Filter provided a conditional guarantee that the Lancy system would enable Laidlaw to comply with the mercury limit. *See* Stipulation and Order dated December 20, 1996.

This guarantee was tied to four operating conditions. Laidlaw clearly met the first three conditions. The fourth operating condition stated that the addition of metals/salts "may be beneficial to the [mercury] removal process." In other words, the conditional guarantee required that non-mercury metals might have to be added to the wastewater to ensure that the balance between mercury and non-mercury metals was at the level necessary to obtain optimal mercury removal by the Lancy system. The reason that there must be a balance between the mercury and non-mercury metals is that if there is not a sufficient level of non-mercury metals in the wastewater to react with the sodium sulfide that is added to the wastewater as part of the treatment process, then the mercury will remain in a soluble form that is not filtered out of the wastewater by the Lancy system. Instead, the mercury is discharged in the effluent. If there is a sufficient level of non-mercury metals to react with the sodium sulfide, the mercury becomes insoluble and is filtered out of the wastewater.

Shortly after the Lancy system was installed on March 15, 1991, Laidlaw began experiencing problems with meeting its mercury limitation. U. S. Filter first recommended adding iron to its wastewater. After receiving approval from DHEC, Laidlaw added iron, which ultimately proved unsuccessful in

bringing about compliance.

In July 1991, U. S. Filter recommended adding copper to the wastewater. DHEC initially refused to allow this addition. After additional discussions, however, DHEC approval was obtained, and copper was added. This also proved unsuccessful.

The solution to meeting the 1.3 ppb limit was ultimately achieved by Laidlaw personnel through experimentation using additional treatment technologies. Laidlaw discovered, subsequent to June 1992, that adding activated carbon filters to the end of the Lancy system effectively reduced the mercury level below 1. 3 ppb, so long as Laidlaw severely restricted the feed rate of mercury-containing waste into the incinerator.

Under these facts, this court finds that Laidlaw acted reasonably in selecting the Lancy system and bringing it on-line.

The second issue regarding good faith compliance relates to plaintiffs' contention that Laidlaw could have resolved mercury excursions by simply restricting the feed rate of mercury-containing waste into the incinerator. On the record before it, however, the court determines that there is no simple linear relationship between the amount of mercury in the feed-rate and the amount of mercury in the effluent.

Thus, the court determines that Laidlaw acted in good faith once it decided to bring the Lancy system on-line. It must be remembered, however, that the court has already determined that the Lancy system should have been selected and installed sooner than it was. *Friends of the Earth v. Laidlaw Environmental Services (TOC), Inc.* , 890 F. Supp. at 483. This court's finding in this regard predated the decision of ALJ Kittrell. Thus, there can be no argument that the court is bound by the ALJ's finding in this respect.

This court's finding of good faith on the part of Laidlaw in regard to the installation of the Lancy system is, therefore, tempered by the fact that Laidlaw waited longer than it should

have to install the system[11]. Additionally, this court has previously determined that other mercury removal equipment that the defendant installed in 1992 and 1993 should have also been brought on-line by January 1, 1988[12].

Harm to the Environment

Laidlaw introduced the results of its nine years of semiannual acute and chronic toxicity tests, the results of the fish tissue study conducted by RMT on bluegill sunfish from the North Tyger River, and the results of the subsequent fish tissue study conducted by DHEC on large mouth bass and other species of fish in the river. Based on these tests, the supporting testimony of Laidlaw's expert witness Dr. Sam White, and the testimony of various DHEC witnesses, this court finds that the water quality standard for mercury is currently being attained in the North Tyger River and that the overall quality of the river exceeds levels necessary to support propagation of fish, shellfish, and wildlife, and recreation in and on the water.

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[11] For reasons discussed later in this order, this court has, however, determined that the on-line date should be January 1, 1988, rather than January 1, 1987.

[12] The conditional guarantee issued by U. S. Filter was the reason the court reopened the record subsequent to the ALJ decision. When the record closed in this case on August 2, 1995, the only documents in the record indicated that U. S. Filter would guarantee the Lancy system would meet all of the permit requirements except for mercury. The ALJ, on the other hand, determined that U. S. Filter guaranteed that Lancy would meet *all* permit requirements. This led to this court's decision to re-open the record. As noted previously, the parties engaged in discovery and then submitted a stipulation to the court regarding the nature of the U. S. Filter guarantee. The court views the new evidence brought into this case by way of the stipulation to be significant, because the record had theretofore indicated that U. S. Filter specifically excluded mercury from its guarantee. As indicated in the body of this opinion, although U. S. Filter initially included such a disclaimer, subsequent negotiations between the parties led to the conditional guarantee upon which the ALJ's finding of good faith was based.

The fish tissue studies performed by RMT and DHEC both showed levels of mercury in the sampled fish well below the Food and Drug Administration (FDA) action level of 1. 0 milligram per kilogram of fish tissue examined. In fact, the DHEC fish study showed no mercury above its detection limit of 0. 25 mg/kg, less than one quarter of the level necessary to trigger the FDA action level.

Laidlaw's macroinvertebrate assessments, which were performed two times per year between 1986 and 1994, and 96-hour flow-through bioassays, which were also performed during this same time period, showed that prior mercury discharge limits as high as 20 ppb had no adverse effect on the indigenous biological community in-the North Tyger River downstream from Laidlaw's facility. Thus, there has been no showing of any significant harm to the environment in this case.

Permit Violations

1. Mercury Exceedances

Laidlaw has violated the daily maximum mercury limitations of the 1987 Permit a total of 489 times. Laidlaw does not dispute these mercury exceedances, which are summarized on the following table:[13]

DISCHARGES IN VIOLATION OF PERMIT					
YEAR	1% to 100% over permit level	101% to 400% over permit level	401 to 1000% over permit level	more than 1000% over permit level	Total number of violations
1987	11	2	--	--	13
1988	29	22	11	6	68
1989	30	28	1	1	60
1990	28	20	5	3	56
1991	91	60	10	5	166
1992	51	60	8	4	123
1993	1	--	--	--	1
1994	--	1	--	--	1
1995	1	--	--	--	1
TOTAL	242	193	35	19	489

As can be seen from the table above, most of the exceedances occurred prior to mid-1992, while Laidlaw was experimenting with various technologies to bring the plant into compliance. Only nine of the exceedances occurred after June 1992.

[13] A more detailed table of the mercury exceedances between 1986 and 1995 is attached to this order as Appendix A.

2. Monitoring and Reporting Violations

Laidlaw has committed 420 violations of the monitoring requirements of the permit and 503 violations of the reporting requirements. These violations are summarized on Plaintiff's Revised Exhibits 77-79, and 97, and 95 Tr. 181-82, 187.

There is a degree of overlap in these calculations, however, because the monitoring violations are also considered reporting violations[14]. There have been 10 reporting requirements violations and 13 monitoring requirements violations since the complaint in this action was filed in June 1992.

A significant number of the reporting and monitoring violations concern technical errors on the forms used by Laidlaw to report its compliance to DHEC. Some of the other monitoring violations relate to things such as the method of sampling used ("grab sample" vs. continuous sampling), the detection level of the mercury monitoring equipment (to a level of 2. 0 ppb rather than 1. 3 ppb), days where no sample was received for metals, and instances where chemical inhibitions or interferences existed in the wastewater effluent samples, which prevented mercury detection below 2. 0 ppb.

CONCLUSIONS OF LAW

Appropriate Relief

This court has jurisdiction over the parties to this action and the subject matter of this action.

[14] Of the 503 reporting violations, 305 involve failure to report discharge violations (as opposed to monitoring violations) properly.

1. Civil Penalty

When a violation of the Act is established, a civil penalty is mandated by Section 309(d) of the Act, 33 U. S. C. § 1319(d). *Stoddard v. Western Carolina Regional Service Authority*, 784 F. 2d 1200, 1208 (4th Cir. 1990). Section 505(a) of the Act, 33 U. S. C. § 1365(a), authorizes this court to assess "any appropriate civil penalties under Section 309(d) of [the] Act. " Prior to its amendment in 1987, Section 309(d), 33 U. S. C. § 1319(d), provided for a civil penalty not to exceed $10,000 per day of violation. In 1987, Congress increased the statutory maximum penalty to $25,000 per day. 101 Stat. 45 (1987).

Pursuant to Section 309(d) of the Clean Water Act, the court is directed to consider the following six factors in determining whether a civil penalty should be assessed in addition to the $100,000 penalty Laidlaw has already paid: (1) the seriousness of the violation or violations; (2) the economic benefit (if any) resulting from the violations; (3) any history of such violations; (4) the defendant's good faith efforts to comply with the applicable requirements; (5) the economic impact of the penalty on the defendant; and (6) such other matters as justice may require.

(a) Seriousness of Violations

Mercury is an extremely toxic pollutant. Mercury can take various forms, including elemental mercury, inorganic mercury, and organic mercury. Organic mercury, or methylmercury, is the most toxic. While most of the mercury that Laidlaw discharges is in the inorganic form, inorganic mercury can methylate, or take its organic form, in sediments, water, or fish tissue.

Preliminarily, the court confirms its ruling at trial sustaining the objection of Laidlaw to certain exhibits proffered

by the plaintiffs (Trial Transcript 1 at 67). Plaintiffs attempted to introduce the EPA's March 1995 Interim Clean Water Act Settlement Penalty Policy. This policy includes, among other considerations, a "gravity component" that employs the use of various factors and considerations in arriving at this particular portion of the penalty. As pointed out by Laidlaw, the policy expressly states that it is not to be used by a court in determining a penalty at a trial. Inasmuch as plaintiffs have not articulated any reason why this court should ignore the plain language of the policy, it will not be considered in arriving at an appropriate penalty amount. The same is true of plaintiffs' Exhibit 133 setting forth the actual calculations made by the plaintiffs applying the factors set forth in the EPA penalty policy.

The court does consider the plaintiffs' selection of a value range of 1-10 under gravity factor B to be probative, however. Gravity factor B involves consideration of health and environmental harm in setting a penalty and, pursuant to the EPA's penalty policy, there are four possible value ranges: 10-50, 1-10, 4-50, and 2-25. The value range of 1-10 selected by the plaintiffs is clearly the range that is indicative of the least amount of health or environmental harm. In fact, the use of this particular value range simply indicates that a water quality-based effluent standard was exceeded and not that any health or environmental harm resulted from that exceedance. In cases where there is an impact on human health, the penalty policy provides a value range of 10-50. Similarly, where there is a fish kill, beach closing, or restrictions on the use of a water body, a value range of 4-50 is indicated. Where there is some other type of impact on the aquatic environment, the appropriate value range is 2-25. The plaintiffs' use of the 1-10 value range constitutes an acknowledgment that the NPDES permit violations at issue in this citizen suit did not result in any health risk or environmental harm.

Concerning the monitoring and reporting violations, the

court recognizes that it has been held that such violations can be considered "serious. " In *Sierra Club v. Simkins Industries, Inc.* , 847 F. 2d 1100 (4th Cir. 1988), the court held that monitoring and reporting violations were serious where the defendant both failed to file any discharge monitoring reports (DMRs) at all for over two and one-half years and further had not even installed monitoring equipment that would have permitted it to comply with its monitoring and reporting obligations. In the case at bar, the monitoring and reporting violations proven to have occurred were a combination of anomalies interfering with properly installed detection equipment, instances where the detection equipment malfunctioned, and technical errors on reporting forms that even DHEC recognizes were a result of confusion as to how to properly complete the forms. These deficiencies were not the result of a failure either to install proper monitoring equipment or to submit timely DMRs.

As the court held in *PIRG v. Yates Industries,* 757 F. Supp. 438, 454 (D. N. J. 1991): "Reporting deficiencies do not produce the type of direct environmental impact which is the primary purpose behind the act. " Moreover, monitoring violations are not considered serious unless they are found to have been in bad faith. *PIRG v. Elf Atochem North America, Inc.* , 36 Env't Rep. Cas. (BNA) 1855, 1867 (D. N. J. 1993).

In this case, Laidlaw's monitoring and reporting deficiencies, all of which have long since been resolved, produced no direct environmental impact. There has been no demonstrated proof of harm to the environment. Moreover, DHEC was made aware on a continuous basis of the compliance problems Laidlaw was experiencing. An open line of communication between Laidlaw and DHEC existed throughout the time period relevant to this litigation. Further, DHEC's knowledge of these problems, its enforcement efforts with respect thereto, and the agency's continued involvement with Laidlaw in achieving a solution to these problems have

resulted in Laidlaw's ultimate compliance with its NPDES permit over an extended period of time. Those monitoring and reporting violations that are technical in nature were not shown to have been a product of bad faith and did not result in DHEC's being mislead or ignorant as to the type or extent of compliance difficulties Laidlaw was experiencing. On this record, the monitoring and reporting violations cannot be said to have constituted "serious" violations of the Act.

The presence or absence of environmental harm is relevant to the assessment of a Clean Water Act penalty. In *Hawaii's 1000 Friends v. City of Honolulu,* 821 F. Supp 368 (D. Haw. 1993), the court was faced with conflicting data regarding whether defendants' Clean Water Act violations had caused environmental harm. . The court concluded that this conflicting evidence was insufficient to demonstrate that harm had actually occurred, and held "the lack of [demonstrated] material harm to be a *significant* mitigating factor in assessing penalties. " 821 F. Supp. at 1395-96. (emphasis added).

The same is true in this case. All available data, including semi-annual acute and chronic toxicity tests performed by Laidlaw over the last nine years, a 1992 fish tissue study conducted by RMT, and a recent fish tissue study conducted by DHEC, fail to show that Laidlaw's *actual* discharges have resulted in harm to the North Tyger River.

Plaintiffs' primary argument regarding this issue centers on the fish tissue study conducted by RMT in 1992. It is plaintiffs' position that this test is inconclusive because it was performed on bluegill sunfish rather than large mouth bass. That study found no fish with mercury bioaccumulation greater than 0. 14 ppm, which is over seven times lower than the FDA action level of 1. 0 ppm. Plaintiffs' expert, Dr. Weiss, looked at a DHEC fish tissue study performed on large mouth bass from an unconnected South Carolina body of water known as the Langley Pond, and extrapolated these results to conclude that large mouth bass in the North Tyger River would exceed

the FDA action limit for mercury.

The DHEC study of large mouth bass in the North Tyger River refutes the conclusion of Dr. Weiss. This study, using detection equipment measuring mercury bioaccumulation at . 25 ppm and higher, detected no mercury in any fish, large mouth bass included, that were analyzed from the North Tyger River.

This test is particularly significant. According to Dr. Sam White, the FDA action level of 1. 0 ppm was established conservatively to protect human health. Protecting fish, on the other hand, would result in a number hundreds of times higher than 1. 0 ppm. The FDA action level was derived from studies of inhabitants of countries where fish are consumed frequently around the world, for example Japan, where it was discovered that no adverse symptoms occur in humans unless the blood level of mercury reaches 200 ppm or greater. In establishing the FDA limit, this minimum symptom threshold was reduced 10 times for safety, and, after being further reduced by other factors, the 1. 0 ppm number was derived.

DHEC's North Tyger River study shows that no fish in that river has a mercury level even one-quarter of a limit that is ten times lower than necessary to protect human health. This test result, considered together with the nine years of acute and chronic toxicity testing data as to the effect of Laidlaw's total effluent on all other aspects of the stream, leads the court to conclude that Laidlaw's effluent, even with the permit exceedances it has experienced, has had no demonstrated adverse affect on the environment.

(b) Economic Benefit of Non-Compliance

As this court held in its April 7, 1995 Order, the capital asset pricing model using an interest rate of 15. 25% is the preferred method of calculating the economic benefit, if any, of non-compliance. Using this methodology, plaintiffs'

economic expert, Dr. Michael Kavanaugh, calculated Laidlaw's economic benefit of non-compliance at $3,139,418. 00. Laidlaw's economic expert, Robert Fuhrman calculated the economic benefit at $884,797. 00. The court finds the economic benefit of non-compliance to be $1,092,581. In so doing, the court adopts most, but not all, of Mr. Fuhrman's analysis.

Preliminarily, the court notes that both experts' calculations involved two types of expenditures: penalty items and credit items. Penalty items involve delayed expenditures that were necessary to bring the facility into compliance with its NPDES permit. Credit items represent expenditures that were either not necessary for compliance or were made because the penalty item equipment was not in place.

The first penalty item set forth in Table 1 of Mr. Fuhrman's report is the neutralization system. Mr. Fuhrman calculates an economic benefit of $303,276 based on a non-compliance date of January 1, 1988. Dr. Kavanaugh, on the other hand, calculates an economic benefit of $675,431 based on a compliance date of January 1, 1987. Mr. Fuhrman performed an alternative calculation using the January 1, 1987 non-compliance date and arrived at the same figure as Mr. Kavanaugh -- *i. e.* , $675,431. Inasmuch as the NPDES permit in question was not issued by DHEC until December 1986, and considering the fact that Laidlaw was given until March 31, 1987 to issue a preliminary feasibility report on achieving the new mercury standard, the court finds that January 1, 1988 is a more realistic and appropriate non-compliance date and thereby adopts Mr. Fuhrman's calculation of $303,276.

The next penalty item is the Lancy system. Mr. Fuhrman calculates an economic benefit of $1,744,000 based on a non-compliance date of January 1, 1988. Dr. Kavanaugh on the other hand calculates an economic benefit of $2,452,000 using a non-compliance date of January 1, 1987. Mr.

Fuhrman presented an alternative calculation to the court using the January 1, 1987 non-compliance date that agrees with Dr. Kavanaugh's calculation. Thus, the only difference between the parties on this particular penalty item is the non-compliance date. For the reasons stated in the immediately preceding paragraph, the court finds that the January 1, 1988 non-compliance date is more appropriate. [15]

Fortunately, the parties are in accord on a number of penalty items: pre-filter ($71,806), gas scrubber study ($15,824), wastewater study ($25,164), ISCO Sampler ($4,856), and miscellaneous one-time expenses ($40,810). The Court agrees and adopts these figures.

As to the credit items, there is sharp disagreement between the parties on several issues. Laidlaw's facility manager, Dale Fentress, testified without contradiction that the ion exchange system and micro-filter piping apparatus are not being operated as part of the facility's wastewater treatment system and in fact were never used on a regular basis. Specifically, Mr. Fentress testified that after the equipment was purchased and installed in 1993, subsequent testing demonstrated that the ion exchange and micro-filter piping equipment were ineffective in further lowering the mercury content of Laidlaw's effluent. In fact, the last time the equipment was used was in November 1994. While plaintiffs' wastewater treatment expert, Dr. Bruce Bell, testified that, in his opinion, Laidlaw did not adequately test the ion exchange and microfiltration equipment, the undisputed fact remains that the equipment has not and is not being used and was, therefore,

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[15] The court's April 7, 1995 order found that the Lancy system should have been installed by January 1, 1987. 890 F. Supp. at 483. Laidlaw subsequently moved to reconsider this finding, supporting its motion with a detailed time line. The court has become convinced that its earlier finding in this regard was in error. The April 7, 1995 order is therefore modified so as to provide that the Lancy system should have been brought on-line by January 1, 1988.

unnecessary for compliance. Since, as noted *supra*, penalty items by definition must be necessary for compliance, the ion exchange and micro-filter systems are not penalty items.

The court finds that Laidlaw purchased the ion exchange and microfiltration systems as part of a reasonable effort to achieve compliance with the very stringent 1. 3 ppb mercury limit but that this equipment was ultimately not necessary to achieve compliance[16]. In other words, Laidlaw spent its money unnecessarily. That raises the important issue of whether the purchase of this unnecessary equipment should be treated as a credit item. Mr. Fuhrman computes a credit of $48,584 and $21,100, respectively, for the ion exchange system and the micro-filter piping. Dr. Kavanaugh, on the other hand, would not extend any credit for the purchase of these two items. He testified that as far as economic benefit is concerned, his analysis treats a willful polluter, who knows what equipment is necessary for compliance but refrains from purchasing it, and a "good faith" polluter, who makes a good faith effort to maintain compliance, the same way. The court adopts Laidlaw's position on this issue. As Dr. Kavanaugh conceded on cross-examination, EPA's policy as set forth in the BEN User's Guide is to allow credits when a company, acting upon the reasonable advice of a competent consultant, purchases equipment that ultimately proves unsuccessful in achieving permit compliance. The court finds this to be a

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[16] Plaintiffs contend that this court has already made a finding that the ion exchange and micro-filter systems were needed and should have been installed by January 1, 1988. In its April 7 order, the court determined that "[a]ll of the mercury removal equipment that the Defendant installed in 1992 and 1993 was necessary to ensure compliance with the 1. 3 ppb mercury limit." 890 F. Supp. at 484. In a strict sense, this finding includes the ion exchange and micro-filter systems. The evidence regarding these two systems, however, was not as fully developed at the earlier hearing. During the July-August 1995 trial, it became clear that this equipment ultimately was not necessary to achieve compliance. The court therefore modifies the April 7, 1995 order to this extent.

reasonable and fair policy. Dr. Kavanaugh explained that he does not give a credit for unsuccessful equipment purchases because he feels that the purchasing company (in this case, Laidlaw) can seek legal redress from either the manufacturer of the equipment or the engineering consultant who recommended its purchase. The court finds this viewpoint impracticable. Obviously, absent an express warranty to the contrary, non-defective equipment purchased upon a reasonable and non-negligent recommendation can nonetheless fail to meet a specified objective -- in this case compliance with the 1. 3 ppb mercury limit.

Applying similar reasoning, the court finds that Mr. Fuhrman's credit of $23,485 for micro-filter rental is appropriate and rejects plaintiff's contention that this good faith rental of unsuccessful equipment should not be counted as a credit item.

The next credit item is the rental of the ISCO Sampler for which Mr. Fuhrman calculates a credit of $5,529. As shown by Plaintiffs' Exhibit 148, Dr. Kavanaugh agrees with this calculation and makes no adjustment to it. Accordingly, the Court will extend a credit of $5,529 for rental of this equipment.

Mr. Fuhrman calculated credits for the next three items, *i. e.* , rental carbon adsorption, 1992 wastewater disposal, and fish tissue study, of $21,332, $24,009, and $18,154, respectively. Dr. Kavanaugh would not extend any credit for these items. The court agrees with Mr. Fuhrman. It must be remembered that Laidlaw is being penalized through the calculation of an economic benefit for delayed expenditures that were necessary for permit compliance. It is undisputed that if these penalty item expenditures had been timely made, Laidlaw would have been in compliance and it would have been unnecessary to spend money on the three credit items at issue. It would be unfair to impose a penalty upon Laidlaw for equipment that it purchased too late while at the same time not

extending a credit for expenditures that clearly would not have been made if those purchases had been timely.

The next credit item is operations and maintenance (O&M) cost. Defendant's Exhibit 245 sets forth the total O&M cost at the facility during the time period of 1988 through 1992. Mr. Fuhrman testified that from this list he selected for a credit those expenditures that would not have been made if Laidlaw had been in compliance with its NPDES mercury limit in a timely fashion. Those items selected for a credit from Defendant's Exhibit 245 are set forth at page 19 of Mr. Fuhrman's July 24, 1995 report. For example, in 1988, Laidlaw spent $139,307. 04 for caustic that it would not have spent had its new pH neutralization system been installed on January 1, 1988. As noted *supra*, Laidlaw is being penalized for the delayed purchase of this system. Given that fact, it is proper that Laidlaw be entitled to a credit for money that it spent in 1988 since this expenditure would have been unnecessary had the neutralization system been in place on January 1, 1988. Mr. Fuhrman's credit of $401,759 is adopted.

The largest credit item involves lost earnings from the voluntary shutdown of the Roebuck incinerator due to Laidlaw's inability to comply with the mercury permit limit. These occurred in June and July of 1992. Mr. Fuhrman calculated that these lost earnings totalled $831,136. To arrive at this figure, he looked at average earnings before interest and taxes of the facility during fiscal year 1992 (August 1991 to September 1992). During this time there was a shutdown of approximately twenty (20) days from June 19 through July 9, 1992, and for this reason these two months were excluded from the calculation. Mr. Fuhrman also excluded January 1992 because of the abnormal amount of shutdown time during that month. He then computed the average earnings for the remaining nine months and compared this average with the earnings during the shutdown months of June and July 1992.

Dr. Kavanaugh approached the shutdown issue differently. His calculations involve a number of scenarios, set forth on Plaintiffs' Exhibit 149. One difference in approach involves Dr. Kavanaugh's inclusion of January 1992 in his calculations as opposed to Mr. Fuhrman's exclusion of that month due to the atypical amount of down time. The court agrees with Mr. Fuhrman's approach. In attempting to calculate the company's normal earnings, it makes more sense to exclude abnormal months.

Another significant difference between these two experts includes Dr. Kavanaugh's use of July 1992 in his calculation whereas Mr. Fuhrman excluded that month because the facility was voluntarily shut down for approximately nine days due to an inability to comply with the mercury limit. Dr. Kavanaugh testified that he used July 1992 because, despite the shutdown, revenues that month were actually above average. His analysis misses the point. Even if the July 1992 revenues were above average, it cannot be seriously disputed that the revenues would have been much higher had the company been operating those nine days. In other words, regardless of what the revenues actually were in July 1992, it is clear that they would have been higher if the company had been able to generate revenues for the nine days that it was not operating.

Dr. Kavanaugh agreed that Laidlaw lost money during the 20 days of shutdown between June 19 and July 9, 1992, but he contended that overall the revenues for 1992 were comparable or better than those in 1991. For the same reason as stated *supra*, this also misses the point. Regardless of what the revenues were in 1992, and regardless of how those 1992 revenues compared to other years, the fact is that the revenues would have been "20 days higher" had Laidlaw not voluntarily shut down the Roebuck facility for 20 days in order to avoid exceeding the mercury parameter of its NPDES permit.

The third significant difference in approach between the two experts involves Mr. Fuhrman's use of a 12-month period

and Dr. Kavanaugh's use of a 34-month period to compute the average monthly earnings of the facility. Mr. Fuhrman testified that he felt that the shorter time frame was more appropriate- because that more accurately reflected market conditions in effect at the time of the June/July 1992 shutdown. By way of example, he testified that if a person wanted to determine how much money he had lost due to being ill and out of work for a month, that person should look at his earnings during the year of the illness and not earnings two or three years earlier. Mr. Fuhrman's approach makes sense and the court adopts it.

Although the court will adopt the basic methodology employed by Dr. Fuhrman in calculating the credit to be allowed for shutdowns, the court agrees with the plaintiffs that not all twenty days of downtime (in June and July 1992) should be credited. The evidence showed that Laidlaw recorded downtime for routine maintenance virtually every month from July 1991 to February 1993, except June and July 1992. Moreover, Laidlaw's plant manager testified that routine maintenance was in fact done during June and July 1992. Accordingly, the court determines that 25% of the 1994 downtime would have been necessary for routine maintenance. The court will, therefore, reduce Fuhrman's downtime credit by twenty-five percent of $831,136 or $207,784. For this reason, Fuhrman's tabulation of the economic benefit of non-compliance with the 1987 permit must be increased by $207,784, to $1,092,581.

Finally, both parties have calculated a credit of $158,607 representing the present value of the June 1992 payment of a $100,000 fine to DHEC. The court agrees and will apply this credit.

A summary of the court's findings regarding the economic benefit of non-compliance with the 1987 permit are set out on the table attached to this order as Appendix B.

(c) History of Violations

All of the permit violations[17] attributable to Laidlaw are set out in the table at Appendix A. The reporting and monitoring violations are set out on Plaintiffs' Revised Exhibits 77-79, and 97 and 95 Tr. 181-82, 187. Because Laidlaw purchased the Roebuck facility from ABCO in January 1986, the court need not look at violations that occurred prior to 1986.

(d) Good Faith Compliance Efforts[18]

This court is required by Section 309(d) of the Clean Water Act, 33 U. S. C. §1319(d), to consider a defendant's good faith effort at compliance in assessing an appropriate penalty for Clean Water Act violations. While a lack of good faith effort would constitute an aggravating factor, a genuine effort to comply, particularly with a highly restrictive NPDES permit limit, will mitigate any penalty that the court might assess. *See U. S. v. Ciampitti*, 669 F. Supp. 684, 700 (D. N. J. 1987) (lack of good faith effort to comply with the law

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[17] Plaintiffs argue that the court must consider all of Laidlaw's permit violations, not just the violations for which Laidlaw is liable. As noted previously, this court removed a number of non-mercury violations from this case under *Gwaltney v. Chesapeake Bay Found., Inc.*, 484 U. S. 49 (1987). Section 309(d)(3) requires the court to consider "any history of such violations" (emphasis added). The court concludes that the use of the word "violations" in subpart (3), as well as subparts (1) and (2), refer to the violations that form the basis of the penalty being contemplated and not past violations, barred under *Gwaltney*, that are not before the court.

[18] As the court observed in its April 7, 1995 opinion, Laidlaw's good faith, or the lack thereof, was not a factor in determining whether the DHEC judicial enforcement proceeding was diligently prosecuted. 890 F. Supp. at 496, n. 22. The penalty phase of this action is, therefore, the first time the court has been required to address the good faith issue.

is aggravating penalty factor); *see also U. S. v. City of Beaumont*, 786 F. Supp. 634, 638-39 (E. D. Tex. 1992) (penalty assessed less than maximum but greater than economic benefit where evidence showed that defendant made no effort to comply with NPDES permit).

Laidlaw presented extensive evidence at the 1993 hearing to demonstrate its efforts to achieve compliance with all parameters in its NPDES permit. These efforts included: (1) contracting with two separate environmental consulting firms to conduct bench and pilot testing of all known technologies for reducing the concentration of mercury and other metals in the waste stream; (2) full scale employment of carbon adsorption technology, followed by sulfide precipitation technology, followed by sulfide precipitation technology combined with carbon adsorption, microfiltration and ion resin exchange technology; (3) the replacement of Laidlaw's cooling system and pH controls; and (4) a drastic reduction of the mercury feed into the incinerator to a small fraction of Laidlaw's RCRA/HSWA permitted feed rate. (Defendant's Exhibit 226).

Following receiving permission from DHEC to construct a treatment system in July 1990, the solution to the non-mercury metals problem was found in March of 1991, with the installation of the Lancy sulfide precipitation system. As this court has previously held, the solution to the mercury problem was not discovered until mid to late 1992, when Laidlaw began utilizing both the Lancy system and carbon adsorption technology together while continuing to severely restrict the mercury feed to the incinerator. 890 F. Supp. at 483.

Laidlaw acted in good faith in relying on qualified environmental consultants to recommend the appropriate technology to solve its wastewater treatment problems. Laidlaw's good faith desire to achieve NPDES compliance is further evidenced by the fact that, after spending more than $1

million on consultants and new wastewater treatment equipment that did not result in compliance. Laidlaw ultimately found the solution through the efforts of its own personnel experimenting with different technologies combined with restricting mercury feed to the incinerator.

Throughout this process, Laidlaw kept DHEC apprised of all efforts to achieve compliance. DHEC was kept apprised of Laidlaw's continuing problems with excursions, and the agency was involved both in reviewing and approving each of the studies, recommendations, and wastewater treatment modifications Laidlaw made to achieve compliance with its permit.

Plaintiffs question Laidlaw's good faith efforts primarily on one ground, that being the allegation that Laidlaw could have resolved its mercury excursions through controlling mercury feed to the incinerator. In support of this assertion, plaintiffs presented a report and chart by Dr. Bruce Bell which indicate that a 79% strength correlation existed between mercury influent and effluent for a period of time extending from March 1991 to December 1992. This report was supplemented by Dr. Bell's testimony that if Laidlaw kept its average mercury feed at 0.01 pounds per day or less, the company could comply with its mercury limit of 1.3 ppb.

This court does not believe that the mercury exceedances Laidlaw experienced were solely a function of the level of mercury fed into the system. While it is obvious that mercury exceedances could be controlled by simply adding no mercury into the system, this is impractical because much of the hazardous waste produced by industry which requires offsite treatment or disposal contains mercury. This is why there is a mercury parameter contained in Laidlaw's permit and it is why Laidlaw installed wastewater treatment equipment to control mercury.

The court also does not accept the argument that Laidlaw could always have achieved mercury compliance by

keeping the mercury feed rate of 0.01 pounds per day. As the court has already found, the solution to Laidlaw's mercury problem was not achieved until Laidlaw, on its own initiative in mid to late 1992, experimented with various technology combinations in addition to reducing the mercury feed. In fact, as Plaintiffs' Exhibits 131 and 150 show, prior to August 1992, Laidlaw restricted the mercury feed to 0.01 pounds per day or less during 20 different months, and the average mercury concentration in the effluent actually exceeded 1.3 ppb 40% of the time. Additionally, there are several examples where the mercury influent far exceeded 0.01 pounds per day but mercury concentration in the effluent was less than 1.3 ppb. Thus, Dr. Bell's contention regarding NPDES compliance at a feed rate of 0. 01 lbs. is not accurate.

Concerning the chart showing a correlation between mercury influent and effluent, Dr. Bell used a twenty-two (22) month period between March 1991 and December 1992, rather than the 5. 5 years of data available to him. This was purportedly because the wastewater treatment plant was "relatively stable" during the period analyzed by Dr. Bell. When it was pointed out at trial that the system was also stable during the period extending at least from December 1988 through March 1991, Dr. Bell could not explain why he did not chart those dates other than to say that his memory must have been faulty as to when things were changing.

In fact, when the entire 5. 5 year time period of time is analyzed, both including periods of equipment stability and change, the alleged strong linear correlation espoused by plaintiffs completely breaks down. More specifically, the linear relationship between mercury influent and effluent decreases to 10% when all of the data is used, and there is no period of time other than the one chosen by Dr. Bell where there is even a 50% relationship between influent and

effluent.[19]

From this analysis, it is clear that Laidlaw could not have achieved compliance with a 1. 3 ppb limit simply by restricting mercury feed, and in fact still cannot do so. Indeed, the testimony of Laidlaw Environmental Manager David DeSha shows that the strict 1. 3 ppb limit has been exceeded twice, in November 1994 and January 1995, when there was no mercury fed into the incinerator at all. The key to controlling mercury effluent is a combination of wastewater treatment efficiency and influent feed. This combination was not achieved until 1992, and fluctuations in mercury feed since that time, usually in the range of 1/6 of an ounce, have not resulted in any mercury excursions.

Laidlaw has thus demonstrated a degree of good faith and, in fact, compliance has now been achieved. This factor warrants a reduction in the penalty.

(e) The Economic Impact of the Penalty Upon the Defendant

In order for this factor to apply, the defendant must establish that a penalty should be reduced because of its economic impact. *PIRG v. Powell Duffryn Terminals, Inc.* , 720 F. Supp. 1158 (D. N. J. 1989).

Plaintiffs' economic expert testified, without contradiction, that Laidlaw could pay a fine of $10 million without any adverse economic impact. For this reason, a fine in the amount determined by this court (see page 40 *infra*) will not force Laidlaw to suffer economic bankruptcy.

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[19] The linear relationship between mercury influent and effluent was 44% from May 1987 to December 1987; 1% from January 1988 to February 1991; 37% from December 1988 through March 1991, when Dr. Bell concedes the system was stable; and only 29% during the March 1991 to December 1992 time period analyzed by Dr. Bell when the two outliers are included in the analysis.

(f) Other Matters As Justice May Require

Several other factors serve to ameliorate the penalty imposed in this case.

1. Laidlaw's Failure to Avail Itself of the Reopener Clause

As this court has already found, Laidlaw was given the option of reopening the 1987 Permit to request a higher limit for mercury once the feasibility studies were completed. 890 F. Supp. at 475-76. It did not, however, do so.

The ETE feasibility study (Defendant's Exhibit 13) noted that the removal of mercury from wastewater to a limit of 1. 3 ppb was "an extremely difficult and complex problem. " It further noted that "there is no inexpensive method to effectively remove mercury to the proposed limit and the technology is still being developed. " At that point in time, faced with such a bleak outlook, Laidlaw could have justifiably returned to DHEC and taken the "easy way out" by requesting a higher limit as authorized by the reopener clause. Instead, Laidlaw followed ETE's recommendation and conducted further studies on the two technologies (carbon filtration and ion exchange) recommended by ETE.

Following this additional evaluation, ETE advised Laidlaw in December 1987, that a second carbon filter in series with the existing carbon filter "*should be* able to meet the 1. 3 ppb required by the NPDES permit. " Defendant Exhibit 30, page 5 (emphasis supplied). Clearly, this rather tentative conclusion fell far short of an unqualified assertion that the two carbon filters would meet the new limit, and at this point in time Laidlaw would again have been justified in returning to DHEC to seek a higher limit under the reopener clause. Instead, Laidlaw elected the more difficult and costly path: install the technology in an attempt to meet the 1. 3 ppb limit. In sum, all parties involved knew that it would be a daunting

task to go from 20 ppb to 1. 3 ppb but Laidlaw elected to try.

2. Recent Compliance History

Related to good faith compliance efforts is the legal principle that a defendant's post-complaint compliance is relevant to the assessment of an appropriate civil penalty. *See FOE v. Facet Industries, Inc.* , 618 F. Supp. 532, 535 n. 1 (W. D. N. Y. 1984). In this case, there has been only one alleged monitoring violation since June 1992, and zero reporting violations since that time. Although Laidlaw experienced eleven mercury excursions between June 12 and October, 1992, there was only one excursion annually in 1993, 1994 and 1995. As indicated above, these latter two mercury excursions occurred even though no mercury was being fed into the incinerator, and these occurrences would not have been excursions but for Plaintiffs' appeal of the new NPDES permit establishing a daily maximum mercury limit of 10 ppb. This compliance history demonstrates that Laidlaw's efforts have remedied its compliance problems and warrants a reduction in the penalty.

3. The Ever-Changing Mercury Limit

The mercury limit for ABCO Industries, which owned the Roebuck plant until it was sold to Laidlaw in 1986, was 20 ppb. The new permit, granted Laidlaw when it purchased the plant, reduced the mercury limit to 10 ppb for 1987 and 1. 3 ppb from 1988 forward. As of June 1, 1996, it is (and will be, unless reversed on appeal) 10 ppb once again. It *could be* 200 ppb but for Laidlaw's demonstrated ability to achieve a much lower limit.

Thus Laidlaw must, for the forseeable future, comply with a mercury limit that is determined in part by the fact that it has purchased the technology to achieve an unusually

restrictive limit. The limit ordinarily would have been much higher.

In *dicta*, the Supreme Court has indicated that a NPDES permittee might be entitled to some consideration for the expenditure of funds in order to achieve a limit lower than what is required. In *Gwaltney v. Chesapeake Bay Foundation*, 484 U. S. 62 (1987), the Court addressed the question of whether citizen suits could be brought for wholly-past violations of the Clean Water Act. In answering this question in the negative, the Court reasoned:

> Suppose that the Administrator identified a violator of the Act and issued a compliance order under § 309(a). Suppose further that the Administrator agreed not to assess or otherwise seek civil penalties on the condition that the violator take some extreme corrective action, such as to install particularly effective but expensive machinery, that it otherwise would not be obliged to take. If citizens could file suit, months or years later, in order to seek the civil penalties that the Administrator chose to forgo, then the Administrator's discretion to enforce the Act in the public interest would be curtailed considerably.

Thus, the Supreme Court, through *dicta*, has indicated that a reduced penalty, or even no penalty, may be appropriate when an administrative sanction is assessed against a violator who has purchased equipment that will allow it to stay far below what would otherwise be required. The court knows of no reason why such a principle should not apply to a judicial

proceeding such as the present one. [20]

(d) Penalty Amount

Although the court finds that Laidlaw's economic benefit equals $1,092,581, the factors set forth in this opinion convince the court that Laidlaw should not be penalized in an amount equal to the economic benefit of non-compliance. In *United States v. Roll Coater, Inc.* , the court indicated in dicta that, although economic benefit is one of the factors to be considered by a court, "other factors may decrease the imposed penalty below the calculated economic benefit. " 21 E. L. R. 21073, 21075 (S. D. Ind. 1991) (emphasis supplied). In *Roll Coater*, the court indicated that such factors could include "evidence of the difficulty of compliance," the fact that there was "no proven damage to the environment, and hence, that the violations were not serious within the meaning of the Act," and the fact that the company worked hand-in-hand with the state agency in an attempt to achieve compliance. *Id.* at 21076-21077. These factors apply in the case at bar. Likewise, in *United States v. Avatar Holdings, Inc.* , the court noted that the "courts' determination of the penalty under the Clean Water Act has been characterized as 'highly discretionary. '" 1996 W. L. 479533, *5 (M. D. Fla. 1996) (cites omitted). Similarly, the court held that a "substantial reduction in the maximum statutory penalty is warranted where the violations caused minimal [or no] environmental damage. " *Id.* at *6. Moreover, the court cannot ignore the fact that the mercury limit has changed significantly while this litigation was pending as further evidence that compliance with the prior, stricter standard was not absolutely necessary to avoid environmental

[20] The court recognizes that the analogy to *Gwaltney* is not perfect. Laidlaw's purchase of technology was in response to the then-imposed 1. 3 ppb limit and not out of a desire to go the extra mile.

harm.

The court establishes a civil penalty according to the following table:

Mercury Exceedances

242 discharges 1% to 100% over permit level @ $200

= $ 48,400

193 discharges 101% to 400% over permit level @ $700

= $135,100

35 discharges 401% to 1,000% over permit level @ $1,000

= $ 35,000

19 discharges more than 1,000% over permit level @ $5,000

= $ 95,000

Monitoring and Reporting Violations

420 monitoring violations @ $100

= $ 42,000

503 reporting violations @ $100

= $ 50,300

$405,800

The above penalty is, on its face, less than half of the economic benefit. It might, therefore, be argued that Laidlaw has ultimately benefitted from its non-compliance and would not, therefore, be deterred from future violations. When the total deterrent effect of this action is considered, however, this

court does not believe this to be the case. That is, in setting the above penalty, this court has considered that Laidlaw will be required to reimburse plaintiffs for a significant amount of legal fees and has, itself, incurred significant legal expenses. Taken together, this court believes the above penalty, potential fee awards, and Laidlaw's own direct and indirect litigation expenses provide adequate deterrence under the circumstances of this case.

2. Equitable Relief

In addition to seeking a monetary penalty, plaintiffs request both a declaratory judgment and injunctive relief. Plaintiffs also ask that this court direct Laidlaw to submit DMRs directly to plaintiffs so that they, along with DHEC and EPA, can monitor Laidlaw's future compliance, and plaintiffs further request all back-up compliance documentation. Laidlaw is not required to submit back-up documentation to DHEC and EPA.

As noted previously, the new limits for mercury (10 ppb daily maximum/1. 25 ppb monthly average) are now in effect unless and until the new permit is reversed by the state courts of South Carolina. For this reason, any injunction issuing from this court would necessarily apply these new, more lenient, standards for mercury.

In order to show that they are entitled to injunctive relief, plaintiffs must demonstrate, at a minimum, that they will suffer irreparable injury if such relief is not granted. *Amoco Production Co. v. Village of Gambell*, 480 U. S. 531, 544-47 (1987); *NRDC v. Texaco Refining and Marketing, Inc.* , 906 F. 2d. 984 (3rd Cir. 1990). Injunctive relief is not appropriate where the defendant is in compliance or in substantial compliance with the Clean Water Act, *PIRG v. Yates Industries*, 757 F. Supp. 438 (D. N. J. 1991); *citing Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982), and a

defendant in substantial compliance with its NPDES permit is not required to show that there is no chance of a future permit violation in order to defeat a request for injunctive relief. *Atlantic States Legal Foundation, Inc. v. Tyson Foods, Inc.*, 897 F. 2d 1128 (5th Cir. 1990).

In this case, Laidlaw has been in substantial compliance with all parameters in its NPDES permit since at least August 1992. This includes mercury, all other metals, temperature, pH and all monitoring and reporting obligations. In fact, Laidlaw has been in compliance with the vast majority of its permit requirements for a much longer period of time, extending back to March 1991 when the Lancy system was installed. The only mercury violations in 1994 and 1995 were at the levels of 2. 7 ppb and 1. 6 ppb, respectively, and these would not have been permit exceedances at all had not plaintiffs by their appeal stayed the effective date of Laidlaw's new NPDES permit containing a daily maximum limit for mercury of 10 ppb. As Laidlaw witness David DeSha testified, without contradiction, these latter two exceedances occurred when there was no mercury being fed to the incinerator, and this demonstrates that it is not possible for Laidlaw to guarantee that there is no chance of a future exceedance of the 10/1. 25 limits now in effect.

Laidlaw's compliance history also must be considered together with the evidence regarding harm to the environment. The lack of demonstrated harm and the fact that Laidlaw is now and has for an extended period of time been in compliance with its permit compels the conclusion that no injunction or other form of equitable relief is appropriate. Accordingly, plaintiffs' request for equitable relief is denied.

CONCLUSION

Based on the foregoing Findings of Fact and Conclusions of Law, the court holds that: this court has

jurisdiction over defendant's violations of its permit and the Clean Water Act; defendant is liable for the violations of the mercury discharge limitation and the violations of the monitoring and reporting requirements of its NPDES permit identified herein; and a civil penalty of $405,800 shall be assessed against defendant for its violations of its permit and the Act. The plaintiffs' request for a permanent injunction is denied.

IT IS SO ORDERED.

Joseph F. Anderson, Jr.
United States District Judge

January 21, 1997
Columbia, South Carolina

APPENDIX A
FRIENDS OF THE EARTH v. LAIDLAW ENVIRONMENTAL SERVICES (TOC)
D.S.C. Civ. No. 1-92-1697-17
CHRONOLOGICAL LIST OF DEFENDANT'S OUTFALL 001 DISCHARGE VIOLATIONS

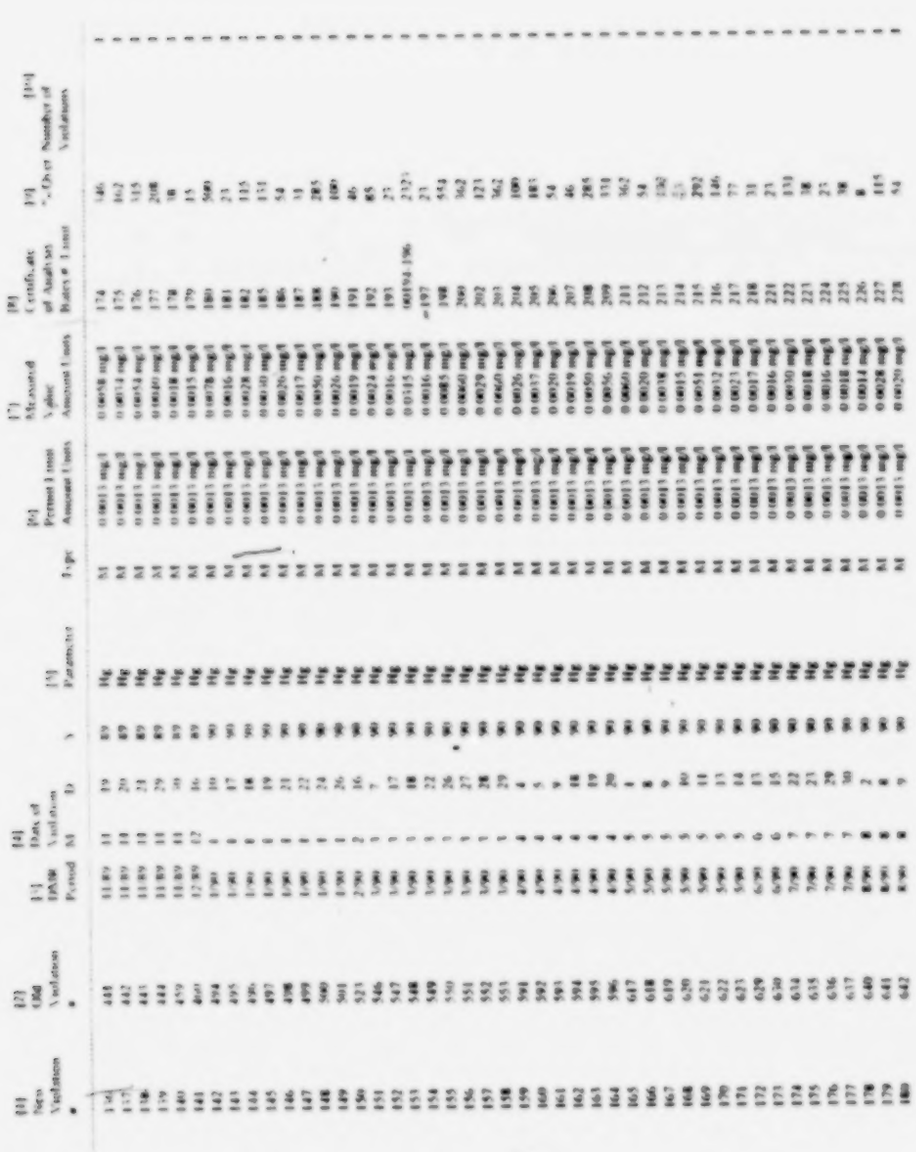
[A] New Violation #	[B] Old Violation #	[C] DMR Period	[D] Date of Violation M	[D] Date of Violation D	[E] Y	[F] Parameter	[G] Permit Limit Amount	[G] Permit Limit Units	[H] Measured Value Amount	[H] Measured Value Units	[I] Certificate of Analysis Basis #	[J] %Over Limit	[K] Number of Violations
1	21	1Q87	-	24	87	Hg	0.0100	mg/l	0.0145	mg/l	-	45	-
2	22	1Q87	-	25	87	Hg	0.0100	mg/l	0.0247	mg/l	2	147	-
3	23	1Q87	-	26	87	Hg	0.0100	mg/l	0.0180	mg/l	3	80	-
4	24	1Q87	-	27	87	Hg	0.0100	mg/l	0.0166	mg/l	4	66	-
5	25	4Q87	4	7	87	Hg	0.0100	mg/l	0.0197	mg/l	5	97	-
6	26	4Q87	4	8	87	Hg	0.0100	mg/l	0.0240	mg/l	6	140	-
7	27	4Q87	5	6	87	Hg	0.0100	mg/l	0.0154	mg/l	7	54	-
8	28	4Q87	5	7	87	Hg	0.0100	mg/l	0.0101	mg/l	8	1	-
9	29	4Q87	5	8	87	Hg	0.0100	mg/l	0.0142	mg/l	9	42	-
10	30	4Q87	5	9	87	Hg	0.0100	mg/l	0.0146	mg/l	10	46	-
11	31	4Q87	6	10	87	Hg	0.0100	mg/l	0.0130	mg/l	11	30	-
12	32	1Q87	12	7	87	Hg	0.0100	mg/l	0.0118	mg/l	12	18	-
13	33	1Q87	12	29	87	Hg	0.0100	mg/l	0.0110	mg/l	13	10	-
14	34	2Q88	-	30	87	Hg	0.0100	mg/l	0.0215	mg/l	14	115	-
15	35	2Q88	2	1	87	Hg	0.0100	mg/l	0.0115	mg/l	15	15	-
16	36	2Q88	2	2	87	Hg	0.0100	mg/l	0.0900	mg/l	16	800	-
17	37	2Q88	2	3	87	Hg	0.0100	mg/l	0.0143	mg/l	17	43	-
18	38	2Q88	2	4	87	Hg	0.0100	mg/l	0.0116	mg/l	18	16	-
19	39	2Q88	2	5	87	Hg	0.0100	mg/l	0.0125	mg/l	19	25	-
20	40	2Q88	2	6	87	Hg	0.0100	mg/l	0.0158	mg/l	20	58	-
21	41	2Q88	2	7	87	Hg	0.0100	mg/l	0.0130	mg/l	21	30	-
22	42	2Q88	2	8	87	Hg	0.0100	mg/l	0.0181	mg/l	22	81	-
23	43	2Q88	2	9	87	Hg	0.0100	mg/l	0.0131	mg/l	23	31	-
24	44	2Q88	2	10	87	Hg	0.0100	mg/l	0.0120	mg/l	24	20	-
25	45	2Q88	2	11	87	Hg	0.0100	mg/l	0.0117	mg/l	25	17	-
26	46	2Q88	2	12	87	Hg	0.0100	mg/l	0.0122	mg/l	26	22	-
27	47	2Q88	2	13	87	Hg	0.0100	mg/l	0.0121	mg/l	27	21	-
28	48	2Q88	2	14	87	Hg	0.0100	mg/l	0.0160	mg/l	28	60	-
29	49	2Q88	2	15	87	Hg	0.0100	mg/l	0.0147	mg/l	29	47	-
30	50	2Q88	2	16	87	Hg	0.0100	mg/l	0.0260	mg/l	30	160	-
31	51	2Q88	2	17	87	Hg	0.0100	mg/l	0.0252	mg/l	31	152	-
32	52	2Q88	2	18	87	Hg	0.0100	mg/l	0.0246	mg/l	32	146	-
33	53	2Q88	2	19	87	Hg	0.0100	mg/l	0.0273	mg/l	33	173	-
34	54	2Q88	2	20	87	Hg	0.0100	mg/l	0.0258	mg/l	34	158	-
35	55	2Q88	2	21	87	Hg	0.0100	mg/l	0.0215	mg/l	35	115	-
36	56	2Q88	2	22	87	Hg	0.0100	mg/l	0.0223	mg/l	36	123	-
37	57	2Q88	2	23	87	Hg	0.0100	mg/l	0.0218	mg/l	37	118	-
38	58	2Q88	2	24	87	Hg	0.0100	mg/l	0.0215	mg/l	38	115	-
39	59	2Q88	2	25	87	Hg	0.0100	mg/l	0.0262	mg/l	39	162	-
40	60	2Q88	2	26	87	Hg	0.0100	mg/l	0.0446	mg/l	40	346	-
41	61	2Q88	2	27	87	Hg	0.0100	mg/l	0.0638	mg/l	41	538	-
42	62	2Q88	2	28	87	Hg	0.0100	mg/l	0.0546	mg/l	42	446	-
43	63	2Q88	2	29	87	Hg	0.0100	mg/l	0.0215	mg/l	43	115	-
44	64	2Q88	3	1	87	Hg	0.0100	mg/l	0.0218	mg/l	44	118	-
45	65	2Q88	3	2	87	Hg	0.0100	mg/l	0.0346	mg/l	45	246	-
46	66	2Q88	3	3	87	Hg	0.0100	mg/l	0.0180	mg/l	46	80	-
47	67	2Q88	3	4	87	Hg	0.0100	mg/l	0.0156	mg/l	47	56	-
48	68	2Q88	3	5	87	Hg	0.0100	mg/l	0.0110	mg/l	48	10	-
49	69	2Q88	3	6	87	Hg	0.0100	mg/l	0.0115	mg/l	49	15	-
50	70	2Q88	3	7	87	Hg	0.0100	mg/l	0.0900	mg/l	50	800	-
51	71	2Q88	3	8	87	Hg	0.0100	mg/l	0.0143	mg/l	51	43	-
52	72	2Q88	3	9	87	Hg	0.0100	mg/l	0.0125	mg/l	52	25	-
53	73	2Q88	3	10	87	Hg	0.0100	mg/l	0.0193	mg/l	53	93	-
54	74	2Q88	3	11	87	Hg	0.0100	mg/l	0.0446	mg/l	54	346	-
55	75	2Q88	3	12	87	Hg	0.0100	mg/l	0.0631	mg/l	55	531	-
56	76	2Q88	3	13	87	Hg	0.0100	mg/l	0.0538	mg/l	56	438	-
57	77	2Q88	3	14	87	Hg	0.0100	mg/l	0.0315	mg/l	57	215	-
58	78	2Q88	3	15	87	Hg	0.0100	mg/l	0.0215	mg/l	58	115	-
59	79	2Q88	3	16	87	Hg	0.0100	mg/l	0.0215	mg/l	59	115	-
60	80	2Q88	3	17	87	Hg	0.0100	mg/l	0.0262	mg/l	60	162	-
61	81	2Q88	3	18	87	Hg	0.0100	mg/l	0.0446	mg/l	61	346	-
62	82	2Q88	3	19	87	Hg	0.0100	mg/l	0.0638	mg/l	62	538	-
63	83	2Q88	3	20	87	Hg	0.0100	mg/l	0.0546	mg/l	63	446	-
64	84	2Q88	3	21	87	Hg	0.0100	mg/l	0.0215	mg/l	64	115	-
65	85	2Q88	3	22	87	Hg	0.0100	mg/l	0.0218	mg/l	65	118	-
66	86	2Q88	3	23	87	Hg	0.0100	mg/l	0.0346	mg/l	66	246	-
67	87	2Q88	3	24	87	Hg	0.0100	mg/l	0.0180	mg/l	67	80	-
68	88	2Q88	3	25	87	Hg	0.0100	mg/l	0.0156	mg/l	68	56	-
69	89	2Q88	3	26	87	Hg	0.0100	mg/l	0.0110	mg/l	69	10	-
70	90	2Q88	3	27	87	Hg	0.0100	mg/l	0.0115	mg/l	70	15	-
71	91	2Q88	3	28	87	Hg	0.0100	mg/l	0.0900	mg/l	71	800	-
72	92	2Q88	3	29	87	Hg	0.0100	mg/l	0.0143	mg/l	72	43	-
73	93	2Q88	3	30	87	Hg	0.0100	mg/l	0.0125	mg/l	73	25	-
74	94	2Q88	3	31	87	Hg	0.0100	mg/l	0.0193	mg/l	74	93	-
75	95	3Q88	7	1	87	Hg	0.0100	mg/l	0.0446	mg/l	75	346	-
76	96	3Q88	7	2	87	Hg	0.0100	mg/l	0.0631	mg/l	76	531	-
77	97	3Q88	7	3	87	Hg	0.0100	mg/l	0.0538	mg/l	77	438	-
78	98	3Q88	7	4	87	Hg	0.0100	mg/l	0.0315	mg/l	78	215	-
79	99	3Q88	7	5	87	Hg	0.0100	mg/l	0.0215	mg/l	79	115	-
80	100	3Q88	7	6	87	Hg	0.0100	mg/l	0.0215	mg/l	80	115	-
81	101	3Q88	7	7	87	Hg	0.0100	mg/l	0.0262	mg/l	81	162	-
82	102	3Q88	7	8	87	Hg	0.0100	mg/l	0.0446	mg/l	82	346	-
83	103	3Q88	7	9	87	Hg	0.0100	mg/l	0.0638	mg/l	83	538	-
84	104	3Q88	7	10	87	Hg	0.0100	mg/l	0.0546	mg/l	84	446	-
85	105	3Q88	7	11	87	Hg	0.0100	mg/l	0.0215	mg/l	85	115	-
86	106	3Q88	7	12	87	Hg	0.0100	mg/l	0.0218	mg/l	86	118	-
87	107	3Q88	7	13	87	Hg	0.0100	mg/l	0.0346	mg/l	87	246	-
88	108	3Q88	7	14	87	Hg	0.0100	mg/l	0.0180	mg/l	88	80	-
89	109	3Q88	7	15	87	Hg	0.0100	mg/l	0.0156	mg/l	89	56	-
90	110	3Q88	7	16	87	Hg	0.0100	mg/l	0.0110	mg/l	90	10	-
91	111	3Q88	7	17	87	Hg	0.0100	mg/l	0.0115	mg/l	91	15	-
92	112	3Q88	7	18	87	Hg	0.0100	mg/l	0.0900	mg/l	92	800	-
93	113	3Q88	7	19	87	Hg	0.0100	mg/l	0.0143	mg/l	93	43	-
94	114	3Q88	7	20	87	Hg	0.0100	mg/l	0.0125	mg/l	94	25	-
95	115	3Q88	7	21	87	Hg	0.0100	mg/l	0.0193	mg/l	95	93	-
96	116	3Q88	7	22	87	Hg	0.0100	mg/l	0.0446	mg/l	96	346	-
97	117	3Q88	7	23	87	Hg	0.0100	mg/l	0.0631	mg/l	97	531	-
98	118	3Q88	7	24	87	Hg	0.0100	mg/l	0.0538	mg/l	98	438	-
99	119	3Q88	7	25	87	Hg	0.0100	mg/l	0.0315	mg/l	99	215	-
100	120	3Q88	7	26	87	Hg	0.0100	mg/l	0.0215	mg/l	100	115	-
101	121	3Q88	7	27	87	Hg	0.0100	mg/l	0.0215	mg/l	101	115	-
102	122	3Q88	7	28	87	Hg	0.0100	mg/l	0.0262	mg/l	102	162	-
103	123	3Q88	7	29	87	Hg	0.0100	mg/l	0.0446	mg/l	103	346	-
104	124	3Q88	7	30	87	Hg	0.0100	mg/l	0.0638	mg/l	104	538	-
105	125	3Q88	7	31	87	Hg	0.0100	mg/l	0.0546	mg/l	105	446	-
106	126	3Q88	8	1	87	Hg	0.0100	mg/l	0.0215	mg/l	106	115	-
107	127	3Q88	8	2	87	Hg	0.0100	mg/l	0.0218	mg/l	107	118	-
108	128	3Q88	8	3	87	Hg	0.0100	mg/l	0.0346	mg/l	108	246	-
109	129	3Q88	8	4	87	Hg	0.0100	mg/l	0.0180	mg/l	109	80	-
110	130	3Q88	8	5	87	Hg	0.0100	mg/l	0.0156	mg/l	110	56	-
111	131	3Q88	8	6	87	Hg	0.0100	mg/l	0.0110	mg/l	111	10	-
112	132	3Q88	8	7	87	Hg	0.0100	mg/l	0.0115	mg/l	112	15	-
113	133	3Q88	8	8	87	Hg	0.0100	mg/l	0.0900	mg/l	113	800	-
114	134	3Q88	8	9	87	Hg	0.0100	mg/l	0.0143	mg/l	114	43	-
115	135	3Q88	8	10	87	Hg	0.0100	mg/l	0.0125	mg/l	115	25	-
116	136	3Q88	8	11	87	Hg	0.0100	mg/l	0.0193	mg/l	116	93	-
117	137	3Q88	8	12	87	Hg	0.0100	mg/l	0.0446	mg/l	117	346	-
118	138	3Q88	8	13	87	Hg	0.0100	mg/l	0.0631	mg/l	118	531	-
119	139	3Q88	8	14	87	Hg	0.0100	mg/l	0.0538	mg/l	119	438	-
120	140	3Q88	8	15	87	Hg	0.0100	mg/l	0.0315	mg/l	120	215	-
121	141	3Q88	8	16	87	Hg	0.0100	mg/l	0.0215	mg/l	121	115	-
122	142	3Q88	8	17	87	Hg	0.0100	mg/l	0.0215	mg/l	122	115	-
123	143	3Q88	8	18	87	Hg	0.0100	mg/l	0.0262	mg/l	123	162	-
124	144	3Q88	8	19	87	Hg	0.0100	mg/l	0.0446	mg/l	124	346	-
125	145	3Q88	8	20	87	Hg	0.0100	mg/l	0.0638	mg/l	125	538	-
126	146	3Q88	8	21	87	Hg	0.0100	mg/l	0.0546	mg/l	126	446	-
127	147	3Q88	8	22	87	Hg	0.0100	mg/l	0.0215	mg/l	127	115	-
128	148	3Q88	8	23	87	Hg	0.0100	mg/l	0.0218	mg/l	128	118	-
129	149	3Q88	8	24	87	Hg	0.0100	mg/l	0.0346	mg/l	129	246	-
130	150	3Q88	8	25	87	Hg	0.0100	mg/l	0.0180	mg/l	130	80	-
131	151	3Q88	8	26	87	Hg	0.0100	mg/l	0.0156	mg/l	131	56	-
132	152	3Q88	8	27	87	Hg	0.0100	mg/l	0.0110	mg/l	132	10	-
133	153	3Q88	8	28	87	Hg	0.0100	mg/l	0.0115	mg/l	133	15	-
134	154	3Q88	8	29	87	Hg	0.0100	mg/l	0.0900	mg/l	134	800	-
135	155	3Q88	8	30	87	Hg	0.0100	mg/l	0.0143	mg/l	135	43	-
136	156	3Q88	8	31	87	Hg	0.0100	mg/l	0.0125	mg/l	136	25	-
137	157	4Q88	9	1	87	Hg	0.0100	mg/l	0.0193	mg/l	137	93	-
138	158	4Q88	9	2	87	Hg	0.0100	mg/l	0.0446	mg/l	138	346	-
139	159	4Q88	9	3	87	Hg	0.0100	mg/l	0.0631	mg/l	139	531	-
140	160	4Q88	9	4	87	Hg	0.0100	mg/l	0.0538	mg/l	140	438	-
141	161	4Q88	9	5	87	Hg	0.0100	mg/l	0.0315	mg/l	141	215	-
142	162	4Q88	9	6	87	Hg	0.0100	mg/l	0.0215	mg/l	142	115	-
143	163	4Q88	9	7	87	Hg	0.0100	mg/l	0.0215	mg/l	143	115	-
144	164	4Q88	9	8	87	Hg	0.0100	mg/l	0.0262	mg/l	144	162	-
145	165	4Q88	9	9	87	Hg	0.0100	mg/l	0.0446	mg/l	145	346	-
146	166	4Q88	9	10	87	Hg	0.0100	mg/l	0.0638	mg/l	146	538	-
147	167	4Q88	9	11	87	Hg	0.0100	mg/l	0.0546	mg/l	147	446	-
148	168	4Q88	9	12	87	Hg	0.0100	mg/l	0.0215	mg/l	148	115	-
149	169	4Q88	9	13	87	Hg	0.0100	mg/l	0.0218	mg/l	149	118	-
150	170	4Q88	9	14	87	Hg	0.0100	mg/l	0.0346	mg/l	150	246	-
151	171	4Q88	9	15	87	Hg	0.0100	mg/l	0.0180	mg/l	151	80	-
152	172	4Q88	9	16	87	Hg	0.0100	mg/l	0.0156	mg/l	152	56	-
153	173	4Q88	9	17	87	Hg	0.0100	mg/l	0.0110	mg/l	153	10	-
154	174	4Q88	9	18	87	Hg	0.0100	mg/l	0.0115	mg/l	154	15	-
155	175	4Q88	9	19	87	Hg	0.0100	mg/l	0.0900	mg/l	155	800	-
156	176	4Q88	9	20	87	Hg	0.0100	mg/l	0.0143	mg/l	156	43	-
157	177	4Q88	9	21	87	Hg	0.0100	mg/l	0.0125	mg/l	157	25	-
158	178	4Q88	9	22	87	Hg	0.0100	mg/l	0.0193	mg/l	158	93	-
159	179	4Q88	9	23	87	Hg	0.0100	mg/l	0.0446	mg/l	159	346	-
160	180	4Q88	9	24	87	Hg	0.0100	mg/l	0.0631	mg/l	160	531	-
161	181	4Q88	9	25	87	Hg	0.0100	mg/l	0.0538	mg/l	161	438	-
162	182	4Q88	9	26	87	Hg	0.0100	mg/l	0.0315	mg/l	162	215	-
163	183	4Q88	9	27	87	Hg	0.0100	mg/l	0.0215	mg/l	163	115	-
164	184	4Q88	9	28	87	Hg	0.0100	mg/l	0.0215	mg/l	164	115	-
165	185	4Q88	9	29	87	Hg	0.0100	mg/l	0.0262	mg/l	165	162	-
166	186	4Q88	9	30	87	Hg	0.0100	mg/l	0.0446	mg/l	166	346	-
167	187	1Q89	1	1	89	Hg	0.0100	mg/l	0.0638	mg/l	167	538	-
168	188	1Q89	1	2	89	Hg	0.0100	mg/l	0.0546	mg/l	168	446	-
169	189	1Q89	1	3	89	Hg	0.0100	mg/l	0.0215	mg/l	169	115	-
170	190	1Q89	1	4	89	Hg	0.0100	mg/l	0.0218	mg/l	170	118	-
171	191	1Q89	1	5	89	Hg	0.0100	mg/l	0.0346	mg/l	171	246	-
172	192	1Q89	1	6	89	Hg	0.0100	mg/l	0.0180	mg/l	172	80	-
173	193	1Q89	1	7	89	Hg	0.0100	mg/l	0.0156	mg/l	173	56	-
174	194	1Q89	1	8	89	Hg	0.0100	mg/l	0.0110	mg/l	174	10	-
175	195	1Q89	1	9	89	Hg	0.0100	mg/l	0.0115	mg/l	175	15	-
176	196	1Q89	1	10	89	Hg	0.0100	mg/l	0.0900	mg/l	176	800	-
177	197	1Q89	1	11	89	Hg	0.0100	mg/l	0.0143	mg/l	177	43	-
178	198	1Q89	1	12	89	Hg	0.0100	mg/l	0.0125	mg/l	178	25	-
179	199	1Q89	1	13	89	Hg	0.0100	mg/l	0.0193	mg/l	179	93	-
180	200	1Q89	1	14	89	Hg	0.0100	mg/l	0.0446	mg/l	180	346	-
181	201	1Q89	1	15	89	Hg	0.0100	mg/l	0.0631	mg/l	181	531	-
182	202	1Q89	1	16	89	Hg	0.0100	mg/l	0.0538	mg/l	182	438	-
183	203	1Q89	1	17	89	Hg	0.0100	mg/l	0.0315	mg/l	183	215	-
184	204	1Q89	1	18	89	Hg	0.0100	mg/l	0.0215	mg/l	184	115	-
185	205	1Q89	1	19	89	Hg	0.0100	mg/l	0.0215	mg/l	185	115	-
186	206	1Q89	1	20	89	Hg	0.0100	mg/l	0.0262	mg/l	186	162	-
187	207	1Q89	1	21	89	Hg	0.0100	mg/l	0.0446	mg/l	187	346	-
188	208	1Q89	1	22	89	Hg	0.0100	mg/l	0.0638	mg/l	188	538	-
189	209	1Q89	1	23	89	Hg	0.0100	mg/l	0.0546	mg/l	189	446	-
190	210	1Q89	1	24	89	Hg	0.0100	mg/l	0.0215	mg/l	190	115	-
191	211	1Q89	1	25	89	Hg	0.0100	mg/l	0.0218	mg/l	191	118	-
192	212	1Q89	1	26	89	Hg	0.0100	mg/l	0.0346	mg/l	192	246	-
193	213	1Q89	1	27	89	Hg	0.0100	mg/l	0.0180	mg/l	193	80	-
194	214	1Q89	1	28	89	Hg	0.0100	mg/l	0.0156	mg/l	194	56	-
195	215	1Q89	1	29	89	Hg	0.0100	mg/l	0.0110	mg/l	195	10	-
196	216	1Q89	1	30	89	Hg	0.0100	mg/l	0.0115	mg/l	196	15	-
197	217	1Q89	1	31	89	Hg	0.0100	mg/l	0.0900	mg/l	197	800	-
198	218	2Q89	4	1	89	Hg	0.0100	mg/l	0.0143	mg/l	198	43	-
199	219	2Q89	4	2	89	Hg	0.0100	mg/l	0.0125	mg/l	199	25	-
200	220	2Q89	4	3	89	Hg	0.0100	mg/l	0.0193	mg/l	200	93	-
201	221	2Q89	4	4	89	Hg	0.0100	mg/l	0.0446	mg/l	201	346	-
202	222	2Q89	4	5	89	Hg	0.0100	mg/l	0.0631	mg/l	202	531	-
203	223	2Q89	4	6	89	Hg	0.0100	mg/l	0.0538	mg/l	203	438	-
204	224	2Q89	4	7	89	Hg	0.0100	mg/l	0.0315	mg/l	204	215	-
205	225	2Q89	4	8	89	Hg	0.0100	mg/l	0.0215	mg/l	205	115	-
206	226	2Q89	4	9	89	Hg	0.0100	mg/l	0.0215	mg/l	206	115	-
207	227	2Q89	4	10	89	Hg	0.0100	mg/l	0.0262	mg/l	207	162	-
208	228	2Q89	4	11	89	Hg	0.0100	mg/l	0.0446	mg/l	208	346	-
209	229	2Q89	4	12	89	Hg	0.0100	mg/l	0.0638	mg/l	209	538	-
210	230	2Q89	4	13	89	Hg	0.0100	mg/l	0.0546	mg/l	210	446	-
211	231	2Q89	4	14	89	Hg	0.0100	mg/l	0.0215	mg/l	211	115	-
212	232	2Q89	4	15	89	Hg	0.0100	mg/l	0.0218	mg/l	212	118	-
213	233	2Q89	4	16	89	Hg	0.0100	mg/l	0.0346	mg/l	213	246	-
214	234	2Q89	4	17	89	Hg	0.0100	mg/l	0.0180	mg/l	214	80	-
215	235	2Q89	4	18	89	Hg	0.0100	mg/l	0.0156	mg/l	215	56	-
216	236	2Q89	4	19	89	Hg	0.0100	mg/l	0.0110	mg/l	216	10	-
217	237	2Q89	4	20	89	Hg	0.0100	mg/l	0.0115	mg/l	217	15	-
218	238	2Q89	4	21	89	Hg	0.0100	mg/l	0.0900	mg/l	218	800	-
219	239	2Q89	4	22	89	Hg	0.0100	mg/l	0.0143	mg/l	219	43	-
220	240	2Q89	4	23	89	Hg	0.0100	mg/l	0.0125	mg/l	220	25	-
221	241	2Q89	4	24	89	Hg	0.0100	mg/l	0.0193	mg/l	221	93	-
222	242	2Q89	4	25	89	Hg	0.0100	mg/l	0.0446	mg/l	222	346	-
223	243	2Q89	4	26	89	Hg	0.0100	mg/l	0.0631	mg/l	223	531	-
224	244	2Q89	4	27	89	Hg	0.0100	mg/l	0.0538	mg/l	224	438	-
225	245	2Q89	4	28	89	Hg	0.0100	mg/l	0.0315	mg/l	225	215	-
226	246	2Q89	4	29	89	Hg	0.0100	mg/l	0.0215	mg/l	226	115	-
227	247	2Q89	4	30	89	Hg	0.0100	mg/l	0.0215	mg/l	227	115	-
228	248	2Q89	5	1	89	Hg	0.0100	mg/l	0.0262	mg/l	228	162	-
229	249	2Q89	5	2	89	Hg	0.0100	mg/l	0.0446	mg/l	229	346	-
230	250	2Q89	5	3	89	Hg	0.0100	mg/l	0.0638	mg/l	230	538	-
231	251	2Q89	5	4	89	Hg	0.0100	mg/l	0.0546	mg/l	231	446	-
232	252	2

CHRONOLOGICAL LIST OF DEFENDANT'S OUTFALL 001 DISCHARGE VIOLATIONS

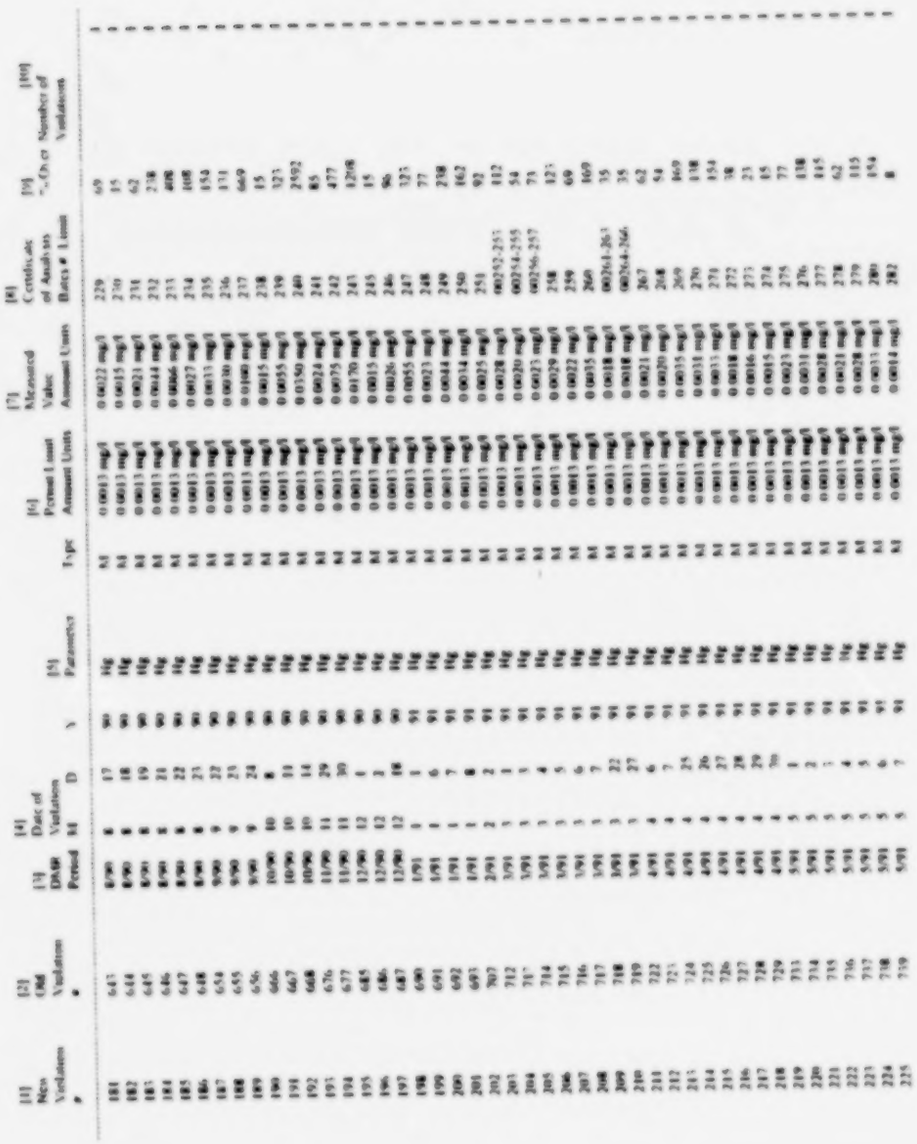
[1] Type	[2] Permit Limit Amount Units	[3] Measured Value Amount Units	[4] Certificate of Analysis Date # 1	[5] C. Or	[6] Number of Violations
A2	0.0015 mg/l	0.0018 mg/l	4	427	
A2	0.0015 mg/l	0.0015 mg/l	48	15	
A2	0.0015 mg/l	0.0050 mg/l	49	285	
A2	0.0015 mg/l	0.0022 mg/l	50	10	
A2	0.0015 mg/l	0.0020 mg/l	51	208	
A2	0.0015 mg/l	0.0041 mg/l	52	215	
A2	0.0015 mg/l	0.0053 mg/l	53	208	
A2	0.0015 mg/l	0.0040 mg/l	54	208	
A2	0.0015 mg/l	0.0019 mg/l	55	46	
A2	0.0015 mg/l	0.0018 mg/l	56	46	
A2	0.0015 mg/l	0.0019 mg/l	57	46	
A2	0.0015 mg/l	0.0150 mg/l	58	1054	
A2	0.0015 mg/l	0.0150 mg/l	59	1054	
A2	0.0015 mg/l	0.0041 mg/l	60	215	
A2	0.0015 mg/l	0.0014 mg/l	61	4	
A2	0.0015 mg/l	0.0019 mg/l	62	40	
A2	0.0015 mg/l	0.0060 mg/l	63	362	
A2	0.0015 mg/l	0.0071 mg/l	64	362	
A2	0.0015 mg/l	0.0025 mg/l	65	92	
A2	0.0015 mg/l	0.0036 mg/l	66	215	
A2	0.0015 mg/l	0.0050 mg/l	67	285	
A2	0.0015 mg/l	0.0075 mg/l	68	477	
A2	0.0015 mg/l	0.0036 mg/l	69	208	
A2	0.0015 mg/l	0.0080 mg/l	70	208	
A2	0.0015 mg/l	0.0079 mg/l	71	123	
A2	0.0015 mg/l	0.0017 mg/l	72	123	
A2	0.0015 mg/l	0.0026 mg/l	73	160	
A2	0.0015 mg/l	0.0027 mg/l	74	208	
A2	0.0015 mg/l	0.0074 mg/l	75	83	
A2	0.0015 mg/l	0.0018 mg/l	76	98	
A2	0.0015 mg/l	0.0060 mg/l	77	362	
A2	0.0015 mg/l	0.0165 mg/l	78	1869	
A2	0.0015 mg/l	0.0072 mg/l	79	454	
A2	0.0015 mg/l	0.0025 mg/l	80	92	
A2	0.0015 mg/l	0.0079 mg/l	81	123	
A2	0.0015 mg/l	0.0015 mg/l	82	15	
A2	0.0015 mg/l	0.0026 mg/l	83	160	
A2	0.0015 mg/l	0.0040 mg/l	84	208	
A2	0.0015 mg/l	0.0014 mg/l	85	15	
A2	0.0015 mg/l	0.0024 mg/l	86	208	
A2	0.0015 mg/l	0.0038 mg/l	87	192	
A2	0.0015 mg/l	0.0022 mg/l	88	208	

[1] Type	[2] Permit Limit Amount Units	[3] Measured Value Amount Units	[4] Certificate of Analysis Date # 1	[5] C. Or	[6] Number of Violations
A2	0.0015 mg/l	0.0016 mg/l	104	177	
A2	0.0015 mg/l	0.0030 mg/l	105	111	
A2	0.0015 mg/l	0.0070 mg/l	106	438	
A2	0.0015 mg/l	0.0020 mg/l	108	9	
A2	0.0015 mg/l	0.0022 mg/l	115	9	
A2	0.0015 mg/l	0.0020 mg/l	116	208	
A2	0.0015 mg/l	0.0040 mg/l	117	9	
A2	0.0015 mg/l	0.0020 mg/l	118	208	
A2	0.0015 mg/l	0.0040 mg/l	119	62	
A2	0.0015 mg/l	0.0021 mg/l	121	192	
A2	0.0015 mg/l	0.0018 mg/l	127	15	
A2	0.0015 mg/l	0.0015 mg/l	130	208	
A2	0.0015 mg/l	0.0040 mg/l	131	118	
A2	0.0015 mg/l	0.0028 mg/l	132	9	
A2	0.0015 mg/l	0.0020 mg/l	133	208	
A2	0.0015 mg/l	0.0040 mg/l	134	9	
A2	0.0015 mg/l	0.0020 mg/l	135	46	
A2	0.0015 mg/l	0.0032 mg/l	136	208	
A2	0.0015 mg/l	0.0049 mg/l	137	277	
A2	0.0015 mg/l	0.0049 mg/l	138	208	
A2	0.0015 mg/l	0.0031 mg/l	139	154	
A2	0.0015 mg/l	0.0021 mg/l	140	62	
A2	0.0015 mg/l	0.0021 mg/l	141	62	
A2	0.0015 mg/l	0.0014 mg/l	142	9	
A2	0.0015 mg/l	0.0018 mg/l	148	9	
A2	0.0015 mg/l	0.0017 mg/l	149	9	
A2	0.0015 mg/l	0.0020 mg/l	150	9	
A2	0.0015 mg/l	0.0018 mg/l	151	9	
A2	0.0015 mg/l	0.0027 mg/l	154	9	
A2	0.0015 mg/l	0.0050 mg/l	155	285	
A2	0.0015 mg/l	0.0040 mg/l	156	208	
A2	0.0015 mg/l	0.0300 mg/l	157	1438	
A2	0.0015 mg/l	0.0014 mg/l	158	9	
A2	0.0015 mg/l	0.0024 mg/l	159	85	
A2	0.0015 mg/l	0.0023 mg/l	160	77	
A2	0.0015 mg/l	0.0015 mg/l	161	15	
A2	0.0015 mg/l	0.0022 mg/l	162	169	
A2	0.0015 mg/l	0.0055 mg/l	166	325	
A2	0.0015 mg/l	0.0050 mg/l	167	285	
A2	0.0015 mg/l	0.0021 mg/l	168	77	
A2	0.0015 mg/l	0.0058 mg/l	170	346	
A2	0.0015 mg/l	0.0027 mg/l	172	108	

CHRONOLOGICAL LIST OF DEFENDANT'S OUTFALL 001 DISCHARGE VIOLATIONS



CHRONOLOGICAL LIST OF DEFENDANT'S OUTFALL 001 DISCHARGE VIOLATIONS



[1] New Violation #	[2] Old Violation #	[3] DMR Period	[4] Date of Violation M	D	Y	[5] Parameter	Type	[6] Permit Limit Amount Units	[7] Measured Value Amount Units	[8] Certificate of Analysis Rates #	[9] % Over Limit	[10] Number of Violations
226	749	5/91	5	8	91	Hg	M	0.0013 mg/l	0.0018 mg/l	283	38	1
227	748	5/91	5	9	91	Hg	M	0.0013 mg/l	0.0058 mg/l	284	346	1
228	742	5/91	5	11	91	Hg	M	0.0013 mg/l	0.0017 mg/l	285	31	1
229	743	5/91	5	12	91	Hg	M	0.0013 mg/l	0.0022 mg/l	286	69	1
230	744	5/91	5	13	91	Hg	M	0.0013 mg/l	0.0033 mg/l	287	154	1
231	745	5/91	5	14	91	Hg	M	0.0013 mg/l	0.0016 mg/l	288	23	1
232	746	5/91	5	19	91	Hg	M	0.0013 mg/l	0.0083 mg/l	290	538	1
233	747	5/91	5	20	91	Hg	M	0.0013 mg/l	0.0014 mg/l	291	8	1
234	748	5/91	5	21	91	Hg	M	0.0013 mg/l	0.0019 mg/l	292	46	1
235	749	5/91	5	22	91	Hg	M	0.0013 mg/l	0.0034 mg/l	293	162	1
236	750	5/91	5	23	91	Hg	M	0.0013 mg/l	0.0027 mg/l	294	108	1
237	751	5/91	5	24	91	Hg	M	0.0013 mg/l	0.0040 mg/l	295	208	1
238	752	5/91	5	25	91	Hg	M	0.0013 mg/l	0.0037 mg/l	296	185	1
239	753	5/91	5	26	91	Hg	M	0.0013 mg/l	0.0044 mg/l	297	238	1
240	754	5/91	5	27	91	Hg	M	0.0013 mg/l	0.0040 mg/l	298	208	1
241	755	5/91	5	28	91	Hg	M	0.0013 mg/l	0.0041 mg/l	299	215	1
242	756	5/91	5	29	91	Hg	M	0.0013 mg/l	0.0038 mg/l	300	192	1
243	757	5/91	5	30	91	Hg	M	0.0013 mg/l	0.0047 mg/l	301	31	1
244	758	5/91	5	31	91	Hg	M	0.0013 mg/l	0.0020 mg/l	302	54	1
245	761	6/91	6	1	91	Hg	M	0.0013 mg/l	0.0043 mg/l	303	231	1
246	762	6/91	6	2	91	Hg	M	0.0013 mg/l	0.0076 mg/l	304	485	1
247	763	6/91	6	3	91	Hg	M	0.0013 mg/l	0.0063 mg/l	305	385	1
248	764	6/91	6	5	91	Hg	M	0.0013 mg/l	0.0092 mg/l	306	608	1
249	765	6/91	6	6	91	Hg	M	0.0013 mg/l	0.0051 mg/l	307	292	1
250	766	6/91	6	7	91	Hg	M	0.0013 mg/l	0.0038 mg/l	308	192	1
251	767	6/91	6	8	91	Hg	M	0.0013 mg/l	0.0014 mg/l	309	8	1
252	768	6/91	6	9	91	Hg	M	0.0013 mg/l	0.0017 mg/l	310	31	1
253	769	6/91	6	10	91	Hg	M	0.0013 mg/l	0.0025 mg/l	312	92	1
254	770	6/91	6	12	91	Hg	M	0.0013 mg/l	0.0036 mg/l	313	177	1
255	771	6/91	6	13	91	Hg	M	0.0013 mg/l	0.0032 mg/l	314	146	1
256	772	6/91	6	15	91	Hg	M	0.0013 mg/l	0.0017 mg/l	317	31	1
257	773	6/91	6	16	91	Hg	M	0.0013 mg/l	0.0015 mg/l	319	15	1
258	774	6/91	6	17	91	Hg	M	0.0013 mg/l	0.0016 mg/l	320	23	1
259	775	6/91	6	18	91	Hg	M	0.0013 mg/l	0.0020 mg/l	321	54	1
260	776	6/91	6	19	91	Hg	M	0.0013 mg/l	0.0017 mg/l	322	31	1
261	777	6/91	6	20	91	Hg	M	0.0013 mg/l	0.0014 mg/l	323	8	1
262	778	6/91	6	23	91	Hg	M	0.0013 mg/l	0.0015 mg/l	324	15	1
263	779	6/91	6	24	91	Hg	M	0.0013 mg/l	0.0046 mg/l	326	254	1
264	780	6/91	6	25	91	Hg	M	0.0013 mg/l	0.0018 mg/l	327	38	1
265	781	6/91	6	28	91	Hg	M	0.0013 mg/l	0.0014 mg/l	328	8	1
266	784	7/91	7	4	91	Hg	M	0.0013 mg/l	0.0016 mg/l	329	23	1
267	785	7/91	7	5	91	Hg	M	0.0013 mg/l	0.0027 mg/l	330	108	1
268	786	7/91	7	6	91	Hg	M	0.0013 mg/l	0.0119 mg/l	331	815	1
269	787	7/91	7	7	91	Hg	M	0.0013 mg/l	0.0176 mg/l	332	1254	1
270	788	7/91	7	8	91	Hg	M	0.0013 mg/l	0.0100 mg/l	60333-334	669	1

[1] New Violation #	[2] Old Violation #	[3] DMR Period	[4] Date of Violation M	D	Y	[5] Parameter	Type	[6] Permit Limit Amount Units	[7] Measured Value Amount Units	[8] Certificate of Analysis Rates #	[9] % Over Limit	[10] Number of Violations
271	789	7/91	7	9	91	Hg	M	0.0013 mg/l	0.0021 mg/l	335	62	1
272	790	7/91	7	10	91	Hg	M	0.0013 mg/l	0.0035 mg/l	336	169	1
273	791	7/91	7	11	91	Hg	M	0.0013 mg/l	0.0082 mg/l	337	531	1
274	792	7/91	7	12	91	Hg	M	0.0013 mg/l	0.0025 mg/l	338	92	1
275	793	7/91	7	13	91	Hg	M	0.0013 mg/l	0.0038 mg/l	339	192	1
276	794	7/91	7	14	91	Hg	M	0.0013 mg/l	0.0014 mg/l	340	8	1
277	795	7/91	7	19	91	Hg	M	0.0013 mg/l	0.0020 mg/l	341	54	1
278	796	7/91	7	21	91	Hg	M	0.0013 mg/l	0.0031 mg/l	342	138	1
279	797	7/91	7	22	91	Hg	M	0.0013 mg/l	0.0029 mg/l	343	123	1
280	800	8/91	8	10	91	Hg	M	0.0013 mg/l	0.0014 mg/l	344	8	1
281	801	8/91	8	15	91	Hg	M	0.0013 mg/l	0.0016 mg/l	345	23	1
282	802	8/91	8	17	91	Hg	M	0.0013 mg/l	0.0020 mg/l	346	54	1
283	803	8/91	8	23	91	Hg	M	0.0013 mg/l	0.0019 mg/l	347	46	1
284	804	8/91	8	27	91	Hg	M	0.0013 mg/l	0.0015 mg/l	348	15	1
285	805	8/91	8	29	91	Hg	M	0.0013 mg/l	0.0022 mg/l	349	69	1
286	810	9/91	9	13	91	Hg	M	0.0013 mg/l	0.0018 mg/l	350	38	1
287	811	9/91	9	14	91	Hg	M	0.0013 mg/l	0.0015 mg/l	351	15	1
288	812	9/91	9	15	91	Hg	M	0.0013 mg/l	0.0018 mg/l	352	38	1
289	813	9/91	9	16	91	Hg	M	0.0013 mg/l	0.0023 mg/l	353	77	1
290	814	9/91	9	17	91	Hg	M	0.0013 mg/l	0.0028 mg/l	354	115	1
291	815	9/91	9	18	91	Hg	M	0.0013 mg/l	0.0018 mg/l	355	38	1
292	816	9/91	9	19	91	Hg	M	0.0013 mg/l	0.0015 mg/l	356	15	1
293	817	9/91	9	20	91	Hg	M	0.0013 mg/l	0.0015 mg/l	357	15	1
294	818	9/91	9	22	91	H_g	M	0.0013 mg/l	0.0024 mg/l	358	85	1
295	819	9/91	9	23	91	Hg	M	0.0013 mg/l	0.0028 mg/l	359	115	1
296	820	9/91	9	24	91	Hg	M	0.0013 mg/l	0.0037 mg/l	360	185	1
297	821	9/91	9	25	91	Hg	M	0.0013 mg/l	0.0029 mg/l	361	123	1
298	822	9/91	9	26	91	Hg	M	0.0013 mg/l	0.0023 mg/l	362	77	1
299	823	9/91	9	29	91	Hg	M	0.0013 mg/l	0.0022 mg/l	363	69	1
300	824	9/91	9	30	91	Hg	M	0.0013 mg/l	0.0018 mg/l	364	38	1
301	827	10/91	10	1	91	Hg	M	0.0013 mg/l	0.0014 mg/l	365	8	1
302	828	10/91	10	4	91	Hg	M	0.0013 mg/l	0.0022 mg/l	366	69	1
303	829	10/91	10	5	91	Hg	M	0.0013 mg/l	0.0015 mg/l	367	15	1
304	830	10/91	10	7	91	Hg	M	0.0013 mg/l	0.0020 mg/l	368	54	1
305	831	10/91	10	8	91	Hg	M	0.0013 mg/l	0.0024 mg/l	369	85	1
306	832	10/91	10	10	91	Hg	M	0.0013 mg/l	0.0019 mg/l	370	46	1
307	833	10/91	10	11	91	Hg	M	0.0013 mg/l	0.0017 mg/l	371	31	1
308	834	10/91	10	12	91	Hg	M	0.0013 mg/l	0.0020 mg/l	372	54	1
309	835	10/91	10	13	91	Hg	M	0.0013 mg/l	0.0022 mg/l	373	69	1
310	836	10/91	10	14	91	Hg	M	0.0013 mg/l	0.0014 mg/l	374	8	1
311	837	10/91	10	15	91	Hg	M	0.0013 mg/l	0.0017 mg/l	375	31	1
312	838	10/91	10	16	91	Hg	M	0.0013 mg/l	0.0041 mg/l	376	215	1
313	839	10/91	10	17	91	Hg	M	0.0013 mg/l	0.0103 mg/l	377	692	1
314	840	10/91	10	18	91	Hg	M	0.0013 mg/l	0.0024 mg/l	378	85	1
315	841	10/91	10	19	91	Hg	M	0.0013 mg/l	0.0065 mg/l	379	400	1

FRIENDS OF THE EARTH v. LAIDLAW ENVIRONMENTAL SERVICES (TOC)
D.S.C. Civ. No. 1:92-1697-17

CHRONOLOGICAL LIST OF DEFENDANT'S OUTFALL 001 DISCHARGE VIOLATIONS

[1] Non Violation #	[2] Old Violation #	[3] DMR Period	[4] Date of Violation Mo	Da	Yr	[5] Parameter	Page	[6] Permit Limit Amount Units	[7] Measured Value Amount Units	[8] Certificate of Analysis Rules # Limit	[9] % Over	[10] Number of Violations
146	142	10/91	10	30	92	00400	1	6.0 SU	5.4 SU	180	85	
147	143	10/91	10	31	92	00400	1	6.0 SU	5.4 SU	180	85	
148	144	10/91	11	1	92	00400	1	6.0 SU	5.4 SU	182	182	
149	145	10/91	11	2	92	00400	1	6.0 SU	5.4 SU	182	217	
150	146	10/91	11	3	92	00400	1	6.0 SU	5.4 SU	183	208	
151	147	10/91	11	4	92	00400	1	6.0 SU	5.4 SU	184	215	
152	148	10/91	11	5	92	00400	1	6.0 SU	5.4 SU	185	215	
153	149	10/91	11	6	92	00400	1	6.0 SU	5.4 SU	186	77	
154	150	10/91	11	7	92	00400	1	6.0 SU	5.4 SU	187	77	
155	151	10/91	11	8	92	00400	1	6.0 SU	5.4 SU	188	115	
156	152	10/91	11	9	92	00400	1	6.0 SU	5.4 SU	189	265	
157	153	10/91	11	10	92	00400	1	6.0 SU	5.4 SU	190	34	
158	154	10/91	11	11	92	00400	1	6.0 SU	5.4 SU	191	162	
159	155	10/91	11	12	92	00400	1	6.0 SU	5.4 SU	192	154	
160	156	10/91	11	13	92	00400	1	6.0 SU	5.4 SU	193	169	
161	157	10/91	11	14	92	00400	1	6.0 SU	5.4 SU	194	77	
162	158	10/91	11	15	92	00400	1	6.0 SU	5.4 SU	195	231	
163	159	10/91	11	16	92	00400	1	6.0 SU	5.4 SU	196	231	
164	160	10/91	11	17	92	00400	1	6.0 SU	5.4 SU	197	208	
165	161	10/91	11	18	92	00400	1	6.0 SU	5.4 SU	198	46	
166	162	10/91	11	19	92	00400	1	6.0 SU	5.4 SU	199	185	
167	163	10/91	11	20	92	00400	1	6.0 SU	5.4 SU	200	185	
168	164	10/91	11	21	92	00400	1	6.0 SU	5.4 SU	201	154	
169	165	10/91	11	22	92	00400	1	6.0 SU	5.4 SU	202	308	
170	166	10/91	11	23	92	00400	1	6.0 SU	5.4 SU	203	231	
171	167	10/91	11	24	92	00400	1	6.0 SU	5.4 SU	204	231	
172	168	10/91	11	25	92	00400	1	6.0 SU	5.4 SU	205	231	
173	169	10/91	11	26	92	00400	1	6.0 SU	5.4 SU	206	231	
174	170	10/91	11	27	92	00400	1	6.0 SU	5.4 SU	207	231	
175	171	10/91	11	28	92	00400	1	6.0 SU	5.4 SU	208	231	
176	172	10/91	11	29	92	00400	1	6.0 SU	5.4 SU	209	231	
177	173	10/91	11	30	92	00400	1	6.0 SU	5.4 SU	210	231	
178	174	10/91	12	1	92	00400	1	6.0 SU	5.4 SU	211	231	
179	175	10/91	12	2	92	00400	1	6.0 SU	5.4 SU	212	231	
180	176	10/91	12	3	92	00400	1	6.0 SU	5.4 SU	213	231	
181	177	10/91	12	4	92	00400	1	6.0 SU	5.4 SU	214	231	
182	178	10/91	12	5	92	00400	1	6.0 SU	5.4 SU	215	231	
183	179	10/91	12	6	92	00400	1	6.0 SU	5.4 SU	216	231	
184	180	10/91	12	7	92	00400	1	6.0 SU	5.4 SU	217	231	
185	181	10/91	12	8	92	00400	1	6.0 SU	5.4 SU	218	231	
186	182	10/91	12	9	92	00400	1	6.0 SU	5.4 SU	219	231	
187	183	10/91	12	10	92	00400	1	6.0 SU	5.4 SU	220	231	
188	184	10/91	12	11	92	00400	1	6.0 SU	5.4 SU	221	231	
189	185	10/91	12	12	92	00400	1	6.0 SU	5.4 SU	222	231	
190	186	10/91	12	13	92	00400	1	6.0 SU	5.4 SU	223	231	
191	187	10/91	12	14	92	00400	1	6.0 SU	5.4 SU	224	231	
192	188	10/91	12	15	92	00400	1	6.0 SU	5.4 SU	225	231	
193	189	10/91	12	16	92	00400	1	6.0 SU	5.4 SU	226	231	
194	190	10/91	12	17	92	00400	1	6.0 SU	5.4 SU	227	231	
195	191	10/91	12	18	92	00400	1	6.0 SU	5.4 SU	228	231	
196	192	10/91	12	19	92	00400	1	6.0 SU	5.4 SU	229	231	
197	193	10/91	12	20	92	00400	1	6.0 SU	5.4 SU	230	231	
198	194	10/91	12	21	92	00400	1	6.0 SU	5.4 SU	231	231	
199	195	10/91	12	22	92	00400	1	6.0 SU	5.4 SU	232	231	
200	196	10/91	12	23	92	00400	1	6.0 SU	5.4 SU	233	231	
201	197	10/91	12	24	92	00400	1	6.0 SU	5.4 SU	234	231	
202	198	10/91	12	25	92	00400	1	6.0 SU	5.4 SU	235	231	
203	199	10/91	12	26	92	00400	1	6.0 SU	5.4 SU	236	231	
204	200	10/91	12	27	92	00400	1	6.0 SU	5.4 SU	237	231	
205	201	10/91	12	28	92	00400	1	6.0 SU	5.4 SU	238	231	
206	202	10/91	12	29	92	00400	1	6.0 SU	5.4 SU	239	231	
207	203	10/91	12	30	92	00400	1	6.0 SU	5.4 SU	240	231	
208	204	10/91	12	31	92	00400	1	6.0 SU	5.4 SU	241	231	
209	205	11/91	1	1	93	00400	1	6.0 SU	5.4 SU	242	231	
210	206	11/91	1	2	93	00400	1	6.0 SU	5.4 SU	243	231	
211	207	11/91	1	3	93	00400	1	6.0 SU	5.4 SU	244	231	
212	208	11/91	1	4	93	00400	1	6.0 SU	5.4 SU	245	231	
213	209	11/91	1	5	93	00400	1	6.0 SU	5.4 SU	246	231	
214	210	11/91	1	6	93	00400	1	6.0 SU	5.4 SU	247	231	
215	211	11/91	1	7	93	00400	1	6.0 SU	5.4 SU	248	231	
216	212	11/91	1	8	93	00400	1	6.0 SU	5.4 SU	249	231	
217	213	11/91	1	9	93	00400	1	6.0 SU	5.4 SU	250	231	
218	214	11/91	1	10	93	00400	1	6.0 SU	5.4 SU	251	231	
219	215	11/91	1	11	93	00400	1	6.0 SU	5.4 SU	252	231	
220	216	11/91	1	12	93	00400	1	6.0 SU	5.4 SU	253	231	

FRIENDS OF THE EARTH v. LAIDLAW ENVIRONMENTAL SERVICES (TOC)
D.S.C. Civ. No. 1:92-1697-17

CHRONOLOGICAL LIST OF DEFENDANT'S OUTFALL 001 DISCHARGE VIOLATIONS

[1] Non Violation #	[2] Old Violation #	[3] DMR Period	[4] Date of Violation Mo	Da	Yr	[5] Parameter	Page	[6] Permit Limit Amount Units	[7] Measured Value Amount Units	[8] Certificate of Analysis Rules # Limit	[9] % Over	[10] Number of Violations
221	217	11/91	1	13	93	00400	1	6.0 SU	5.4 SU	254	231	
222	218	11/91	1	14	93	00400	1	6.0 SU	5.4 SU	255	231	
223	219	11/91	1	15	93	00400	1	6.0 SU	5.4 SU	256	231	
224	220	11/91	1	16	93	00400	1	6.0 SU	5.4 SU	257	231	
225	221	11/91	1	17	93	00400	1	6.0 SU	5.4 SU	258	231	
226	222	11/91	1	18	93	00400	1	6.0 SU	5.4 SU	259	231	
227	223	11/91	1	19	93	00400	1	6.0 SU	5.4 SU	260	231	
228	224	11/91	1	20	93	00400	1	6.0 SU	5.4 SU	261	231	
229	225	11/91	1	21	93	00400	1	6.0 SU	5.4 SU	262	231	
230	226	11/91	1	22	93	00400	1	6.0 SU	5.4 SU	263	231	
231	227	11/91	1	23	93	00400	1	6.0 SU	5.4 SU	264	231	
232	228	11/91	1	24	93	00400	1	6.0 SU	5.4 SU	265	231	
233	229	11/91	1	25	93	00400	1	6.0 SU	5.4 SU	266	231	
234	230	11/91	1	26	93	00400	1	6.0 SU	5.4 SU	267	231	
235	231	11/91	1	27	93	00400	1	6.0 SU	5.4 SU	268	231	
236	232	11/91	1	28	93	00400	1	6.0 SU	5.4 SU	269	231	
237	233	11/91	1	29	93	00400	1	6.0 SU	5.4 SU	270	231	
238	234	11/91	1	30	93	00400	1	6.0 SU	5.4 SU	271	231	
239	235	11/91	1	31	93	00400	1	6.0 SU	5.4 SU	272	231	
240	236	11/91	2	1	93	00400	1	6.0 SU	5.4 SU	273	231	
241	237	11/91	2	2	93	00400	1	6.0 SU	5.4 SU	274	231	
242	238	11/91	2	3	93	00400	1	6.0 SU	5.4 SU	275	231	
243	239	11/91	2	4	93	00400	1	6.0 SU	5.4 SU	276	231	
244	240	11/91	2	5	93	00400	1	6.0 SU	5.4 SU	277	231	
245	241	11/91	2	6	93	00400	1	6.0 SU	5.4 SU	278	231	
246	242	11/91	2	7	93	00400	1	6.0 SU	5.4 SU	279	231	
247	243	11/91	2	8	93	00400	1	6.0 SU	5.4 SU	280	231	
248	244	11/91	2	9	93	00400	1	6.0 SU	5.4 SU	281	231	
249	245	11/91	2	10	93	00400	1	6.0 SU	5.4 SU	282	231	
250	246	11/91	2	11	93	00400	1	6.0 SU	5.4 SU	283	231	
251	247	11/91	2	12	93	00400	1	6.0 SU	5.4 SU	284	231	
252	248	11/91	2	13	93	00400	1	6.0 SU	5.4 SU	285	231	
253	249	11/91	2	14	93	00400	1	6.0 SU	5.4 SU	286	231	
254	250	11/91	2	15	93	00400	1	6.0 SU	5.4 SU	287	231	
255	251	11/91	2	16	93	00400	1	6.0 SU	5.4 SU	288	231	
256	252	11/91	2	17	93	00400	1	6.0 SU	5.4 SU	289	231	
257	253	11/91	2	18	93	00400	1	6.0 SU	5.4 SU	290	231	
258	254	11/91	2	19	93	00400	1	6.0 SU	5.4 SU	291	231	
259	255	11/91	2	20	93	00400	1	6.0 SU	5.4 SU	292	231	
260	256	11/91	2	21	93	00400	1	6.0 SU	5.4 SU	293	231	
261	257	11/91	2	22	93	00400	1	6.0 SU	5.4 SU	294	231	
262	258	11/91	2	23	93	00400	1	6.0 SU	5.4 SU	295	231	
263	259	11/91	2	24	93	00400	1	6.0 SU	5.4 SU	296	231	
264	260	11/91	2	25	93	00400	1	6.0 SU	5.4 SU	297	231	
265	261	11/91	2	26	93	00400	1	6.0 SU	5.4 SU	298	231	
266	262	11/91	2	27	93	00400	1	6.0 SU	5.4 SU	299	231	
267	263	11/91	2	28	93	00400	1	6.0 SU	5.4 SU	300	231	
268	264	11/91	3	1	93	00400	1	6.0 SU	5.4 SU	301	231	
269	265	11/91	3	2	93	00400	1	6.0 SU	5.4 SU	302	231	
270	266	11/91	3	3	93	00400	1	6.0 SU	5.4 SU	303	231	
271	267	11/91	3	4	93	00400	1	6.0 SU	5.4 SU	304	231	
272	268	11/91	3	5	93	00400	1	6.0 SU	5.4 SU	305	231	
273	269	11/91	3	6	93	00400	1	6.0 SU	5.4 SU	306	231	
274	270	11/91	3	7	93	00400	1	6.0 SU	5.4 SU	307	231	
275	271	11/91	3	8	93	00400	1	6.0 SU	5.4 SU	308	231	
276	272	11/91	3	9	93	00400	1	6.0 SU	5.4 SU	309	231	
277	273	11/91	3	10	93	00400	1	6.0 SU	5.4 SU	310	231	
278	274	11/91	3	11	93	00400	1	6.0 SU	5.4 SU	311	231	
279	275	11/91	3	12	93	00400	1	6.0 SU	5.4 SU	312	231	
280	276	11/91	3	13	93	00400	1	6.0 SU	5.4 SU	313	231	
281	277	11/91	3	14	93	00400	1	6.0 SU	5.4 SU	314	231	
282	278	11/91	3	15	93	00400	1	6.0 SU	5.4 SU	315	231	
283	279	11/91	3	16	93	00400	1	6.0 SU	5.4 SU	316	231	
284	280	11/91	3	17	93	00400	1	6.0 SU	5.4 SU	317	231	
285	281	11/91	3	18	93	00400	1	6.0 SU	5.4 SU	318	231	
286	282	11/91	3	19	93	00400	1	6.0 SU	5.4 SU	319	231	
287	283	11/91	3	20	93	00400	1	6.0 SU	5.4 SU	320	231	
288	284	11/91	3	21	93	00400	1	6.0 SU	5.4 SU	321	231	
289	285	11/91	3	22	93	00400	1	6.0 SU	5.4 SU	322	231	
290	286	11/91	3	23	93	00400	1	6.0 SU	5.4 SU	323	231	
291	287	11/91	3	24	93	00400	1	6.0 SU	5.4 SU	324	231	
292	288	11/91	3	25	93	00400	1	6.0 SU	5.4 SU	325	231	
293	289	11/91	3	26	93	00400	1	6.0 SU	5.4 SU	326	231	
294	290	11/91	3	27	93	00400	1	6.0 SU	5.4 SU	327	231	
295	291	11/91	3	28	93	00400	1	6.0 SU	5.4 SU	328	231	
296	292	11/91	3	29	93	00400	1	6.0 SU	5.4 SU	329	231	
297	293	11/91	3	30	93	00400	1	6.0 SU	5.4 SU	330	231	
298	294	11/91	3	31	93	00400	1	6.0 SU	5.4 SU	331	231	
299	295	11/91	4	1	93	00400	1	6.0 SU	5.4 SU	332	231	
300	296	11/91	4	2	93	00400	1	6.0 SU	5.4 SU	333	231	

FRIENDS OF THE EARTH v. LAIDLAW ENVIRONMENTAL SERVICES (TOC)
D.S.C. Civ. No. 3:92-1697-17

CHRONOLOGICAL LIST OF DEFENDANT'S OUTFALL 001 DISCHARGE VIOLATIONS

[1] Rec. Violation #	[2] Old Violation #	[3] DMR Period	[4] Date of Violation M	D	Y	[5] Parameter	Type	[6] Percent Limit Amount Units	[7] Measured Value Amount Units	[8] Certificate of Analysis Rdcv # Limit	[9] % Over Limit	[10] Number of Violations
486	942	592	1	30	92	50	A2	0.0001 mg/l	0.0067 mg/l	470	415	
487	943	592	1	31	92	51	A2	0.0001 mg/l	0.0043 mg/l	471	315	
488	944	592	2	1	92	52	A2	0.0001 mg/l	0.0059 mg/l	472	315	
489	945	592	2	2	92	53	A2	0.0001 mg/l	0.0074 mg/l	473	85	
490	946	592	2	3	92	54	A2	0.0001 mg/l	0.0055 mg/l	474	575	
491	947	592	2	4	92	55	A2	0.0001 mg/l	0.0014 mg/l	475	862	
492	948	592	2	5	92	56	A2	0.0001 mg/l	0.0015 mg/l	476	15	
493	949	592	2	6	92	57	A2	0.0001 mg/l	0.0029 mg/l	477	9	
494	950	592	2	7	92	58	A2	0.0001 mg/l	0.0026 mg/l	478	17	
495	951	592	2	8	92	59	A2	0.0001 mg/l	0.0024 mg/l	479	85	
496	952	592	2	9	92	60	A2	0.0001 mg/l	0.0014 mg/l	480	862	
497	953	592	2	10	92	61	A2	0.0001 mg/l	0.0025 mg/l	481	92	
498	954	592	2	11	92	62	A2	0.0001 mg/l	0.0041 mg/l	482	215	
499	955	592	2	12	92	63	A2	0.0001 mg/l	0.0011 mg/l	483	138	
500	956	592	2	13	92	64	A2	0.0001 mg/l	0.0018 mg/l	484	38	
501	957	592	2	14	92	65	A2	0.0001 mg/l	0.0030 mg/l	485	131	
502	958	592	2	15	92	66	A2	0.0001 mg/l	0.0030 mg/l	486	131	
503	959	592	2	16	92	67	A2	0.0001 mg/l	0.0028 mg/l	487	115	
504	960	592	2	17	92	68	A2	0.0001 mg/l	0.0074 mg/l	488	362	
505	961	592	2	18	92	69	A2	0.0001 mg/l	0.0036 mg/l	489	131	
506	962	592	2	19	92	70	A2	0.0001 mg/l	0.0033 mg/l	490	215	
507	963	592	2	20	92	71	A2	0.0001 mg/l	0.0040 mg/l	491	208	
508	964	592	2	21	92	72	A2	0.0001 mg/l	0.0031 mg/l	492	138	
509	965	592	2	22	92	73	A2	0.0001 mg/l	0.0036 mg/l	493	180	
510	966	592	2	23	92	74	A2	0.0001 mg/l	0.0037 mg/l	494	185	
511	967	592	2	24	92	75	A2	0.0001 mg/l	0.0025 mg/l	495	92	
512	968	592	2	25	92	76	A2	0.0001 mg/l	0.0024 mg/l	496	85	
513	969	592	2	26	92	77	A2	0.0001 mg/l	0.0057 mg/l	497	138	
514	970	592	2	27	92	78	A2	0.0001 mg/l	0.0014 mg/l	498	362	
515	971	592	2	28	92	79	A2	0.0001 mg/l	0.0023 mg/l	499	62	
516	972	592	2	29	92	80	A2	0.0001 mg/l	0.0031 mg/l	500	138	
517	973	592	3	1	92	81	A2	0.0001 mg/l	0.0024 mg/l	501	85	
518	974	592	3	2	92	82	A2	0.0001 mg/l	0.0023 mg/l	502	62	
519	975	592	3	3	92	83	A2	0.0001 mg/l	0.0028 mg/l	503	62	
520	976	592	3	4	92	84	A2	0.0001 mg/l	0.0015 mg/l	504	115	
521	977	592	3	5	92	85	A2	0.0001 mg/l	0.0027 mg/l	505	169	
522	978	592	3	6	92	86	A2	0.0001 mg/l	0.0026 mg/l	506	108	
523	979	592	3	7	92	87	A2	0.0001 mg/l	0.0023 mg/l	507	77	
524	980	592	3	8	92	88	A2	0.0001 mg/l	0.0026 mg/l	508	108	
525	981	592	3	9	92	89	A2	0.0001 mg/l	0.0033 mg/l	509	154	
526	982	592	3	10	92	90	A2	0.0001 mg/l	0.0025 mg/l	510	92	
527	983	592	3	11	92	91	A2	0.0001 mg/l	0.0016 mg/l	511	23	
528	984	592	3	12	92	92	A2	0.0001 mg/l	0.0015 mg/l	512	15	
529	985	592	3	13	92	93	A2	0.0001 mg/l	0.0022 mg/l	513	46	
530	986	592	3	14	92	94	A2	0.0001 mg/l	0.0018 mg/l	514	77	
531	987	592	3	15	92	95	A2	0.0001 mg/l	0.0016 mg/l	515	69	
532	988	592	3	16	92	96	A2	0.0001 mg/l	0.0027 mg/l	516	108	

FRIENDS OF THE EARTH v. LAIDLAW ENVIRONMENTAL SERVICES (TOC)
D.S.C. Civ. No. 3:92-1697-17

CHRONOLOGICAL LIST OF DEFENDANT'S OUTFALL 001 DISCHARGE VIOLATIONS

[1] Rec. Violation #	[2] Old Violation #	[3] DMR Period	[4] Date of Violation M	D	Y	[5] Parameter	Type	[6] Percent Limit Amount Units	[7] Measured Value Amount Units	[8] Certificate of Analysis Rdcv # Limit	[9] % Over Limit	[10] Number of Violations
533	989	592	3	17	92	97	A2	0.0001 mg/l	0.0018 mg/l	517	38	
534	990	592	3	18	92	98	A2	0.0001 mg/l	0.0014 mg/l	518	862	
535	991	592	3	19	92	99	A2	0.0001 mg/l	0.0025 mg/l	519	92	
536	992	592	3	20	92	100	A2	0.0001 mg/l	0.0026 mg/l	520	108	
537	993	592	3	21	92	101	A2	0.0001 mg/l	0.0022 mg/l	521	69	
538	994	592	3	22	92	102	A2	0.0001 mg/l	0.0019 mg/l	522	46	
539	995	592	3	23	92	103	A2	0.0001 mg/l	0.0016 mg/l	523	177	
540	996	592	3	24	92	104	A2	0.0001 mg/l	0.0036 mg/l	524	177	
541	997	592	3	25	92	105	A2	0.0001 mg/l	0.0019 mg/l	525	208	
542	998	592	3	26	92	106	A2	0.0001 mg/l	0.0018 mg/l	526	192	
543	999	592	3	27	92	107	A2	0.0001 mg/l	0.0018 mg/l	527	154	
544	1000	592	3	28	92	108	A2	0.0001 mg/l	0.0068 mg/l	528	1362	
545	1001	592	3	29	92	109	A2	0.0001 mg/l	0.0024 mg/l	529	425	
546	1002	592	3	30	92	110	A2	0.0001 mg/l	0.0015 mg/l	530	85	
547	1003	592	3	31	92	111	A2	0.0001 mg/l	0.0024 mg/l	531	85	
548	1004	592	4	1	92	112	A2	0.0001 mg/l	0.0027 mg/l	532	108	
549	1005	592	4	2	92	113	A2	0.0001 mg/l	0.0026 mg/l	533	108	
550	1006	592	4	3	92	114	A2	0.0001 mg/l	0.0032 mg/l	534	146	
551	1007	592	4	4	92	115	A2	0.0001 mg/l	0.0031 mg/l	535	138	
552	1008	592	4	5	92	116	A2	0.0001 mg/l	0.0038 mg/l	536	192	
553	1009	592	4	6	92	117	A2	0.0001 mg/l	0.0054 mg/l	537	315	
554	1010	592	4	7	92	118	A2	0.0001 mg/l	0.0161 mg/l	538	1131	
555	1011	592	4	8	92	119	A2	0.0001 mg/l	0.0038 mg/l	539	192	
556	1012	592	4	9	92	120	A2	0.0001 mg/l	0.0031 mg/l	540	131	
557	1013	592	4	10	92	121	A2	0.0001 mg/l	0.0064 mg/l	541	362	
558	1014	592	4	11	92	122	A2	0.0001 mg/l	0.0108 mg/l	542	769	
559	1015	592	4	12	92	123	A2	0.0001 mg/l	0.0140 mg/l	543	1046	
560	1016	592	4	13	92	124	A2	0.0001 mg/l	0.0145 mg/l	544	1015	
561	1017	592	4	14	92	125	A2	0.0001 mg/l	0.0039 mg/l	545	15	
562	1018	592	4	15	92	126	A2	0.0001 mg/l	0.0023 mg/l	546	46	
563	1019	592	4	16	92	127	A2	0.0001 mg/l	0.0018 mg/l	547	77	
564	1020	592	4	17	92	128	A2	0.0001 mg/l	0.0016 mg/l	548	38	
565	1021	592	4	18	92	129	A2	0.0001 mg/l	0.0027 mg/l	549	108	
566	1022	592	4	19	92	130	A2	0.0001 mg/l	0.0026 mg/l	550	108	
567	1023	592	4	20	92	131	A2	0.0001 mg/l	0.0016 mg/l	551	23	
568	1024	592	4	21	92	132	A2	0.0001 mg/l	0.0018 mg/l	552	38	

[1] New Violation #	[2] Old Violation #	[3] DMR Period	[4] Date of Violation M	D	Y	[5] Parameter	Type	[6] Permit Limit Amount	Units	[7] Measured Value Amount	Units	[8] Certificate of Analysis Rates #	Limit	[9] % Over	[10] Number of Violations

(1) For ease of reference plaintiffs have numbered each of the violations listed in this exhibit

(2) The entries in this column identify the old violation number

(3) The entries in this column identify the discharge monitoring period in which the violation occurred

(4) This column identifies the dates of defendant's violations by month (M) day(s) (d) and year (Y). Monthly violations are identified by month and year only.

(5) The entries in this column identify the parameters for which the defendant violated the discharge limitations in its NPDES permit. The following abbreviations have been used:

Hg Mercury

(6) The entries in this column identify the discharge limitations set forth in defendant's NPDES permit which were violated. The following abbreviations have been used:

M Maximum
mg/l milligrams/liter

(7) The entries in this column identify the measured value of defendant's discharge as set forth in its certificate of analysis

(8) The entries in this column identify the Rates number of the defendant's certificate of analysis

(9) The entries in this column identify the percent by which defendant's discharge of the pollutant exceeded the amount allowed by its NPDES permit

(10) Violation of daily maximum discharge limitations are counted as 1 day of violation

CHRONOLOGICAL LISTING OF EXCEEDANCES OF DISCHARGE LIMITATIONS
FOR NPDES PERMIT SC0003646 AT SEARS-ROEBUCK STORE
D.S.C. Civ. No. 92-3097-17
EXHIBIT 1

Appendix B
Economic Benefit Calculations

		Economic Benefit as of Penalty Payment Date
Penalty Items	**Category**	**October 95**
1 Neutralization System	Capital and O&M	$ 303,276
2 Lancy System	Capital and O&M	$1,744,000
3 Carbon Adsorption System	Capital and O&M	$ 232,756
4 Pre-Filter	Capital and O&M	$ 71,806
5 Gas Scrubber Study	One-Time	$ 15,824
6 Wastewater Study	One-Time	$ 25,164
7 ISCO Sampler	One-Time	$ 4,856
8 Miscellaneous One-Time Expenses	One-Time	$ 40,810
Credit Items		
1 Ion Exchange System	Capital	($ 48,584)
2 Micro Filter (Piping Only)	Capital	($ 21,100)
3 Rental of Micro Filter Units	O&M	($ 23,485)
4 Rental of ISCO Sampler	O&M	($ 5,529)
5 Rental of Carbon Adsorption System	O&M	($ 21,332)
6 1992 Wastewater Disposal	O&M	($ 24,009)
7 Fish Tissue Study	One-Time	($ 18,154)
8 O&M Cost Savings	O&M	($ 401,759)
9 Lost Earnings from Incinerator Shutdown	One-Time	($ 623,352)
	Subtotal Credit Items	($1,187,304)
Payment to DHEC	One-Time	($ 158,607)
NET ECONOMIC BENEFIT		$1,092,581

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Friends of the Earth, Inc.; Citizens Local Environmental Action Network, Inc.; and Sierra Club,

Plaintiffs,

v.

Laidlaw Environmental Services (TOC), Inc.

Defendant.

JUDGMENT

C/A No. 3:92-1697-17

This action came to trial without a jury before the court, the Honorable Joseph F. Anderson, Jr., District Judge, presiding. The issues having been duly heard, and the court's Findings of Facts and Conclusions of Law having been duly rendered by order filed January 22, 1997,

IT IS ORDERED AND ADJUDGED that this court has jurisdiction over the defendant Laidlaw Environmental Services (TOC), Inc.'s violations of the mercury discharge limitation and the violations of the monitoring and reporting requirements of its NPDES permit, and the Clean Water Act 33 USC §1365.

IT IS FURTHER ORDERED AND ADJUDGED that the defendant, Laidlaw Environmental Services (TOC), Inc. is assessed a civil penalty in the amount of Four Hundred Five Thousand and Eight Hundred and no/100 ($405,800.00) Dollars. Post judgment interest shall accrue at the rate of 5.61%.

Further, the court having duly heard and granted in part on June 27, 1995, defendant Laidlaw Environmental Services (TOC), Inc.'s motion for summary judgment,

IT IS ORDERED AND ADJUDGED that partial summary judgment is entered for the defendant Laidlaw Environmental Services (TOC), Inc. as to the plaintiffs' allegations of effluent discharge violations other than mercury.

LARRY W. PROPES, CLERK

January 22, 1997
Columbia, South Carolina

By: _____
Gail Hayden, Deputy Clerk

SO APPROVED:

_____
Joseph F. Anderson, Jr.
United States District Judge

[RELEVANT DOCKET ENTRIES FROM]

GENERAL DOCKET FOR
Fourth Circuit Court of Appeals

Court of Appeals Docket # 97-1246 Filed 2/25/97
Nsuit 3893 Environmental Matters
Friends of the Earth, et al v Laidlaw Environ Ser
Appeal from District of South Carolina at Columbia

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Docket as of March 4, 1999 11:00 pm Page 5

Proceedings include all events.
97-1246 Friends of the Earth, et al v. Laidlaw Environ Ser

2/25/97 Civil case docketed. (db) [97-1246]

2/25/97 Docketing notice issued. [97-1246] (db) [97-1246]

2/26/97 Docketing notice issued. [97-1261] (db) [97-1261]

2/26/97 CLERK ORDER FILED consolidating case 97-1261 with 97-1246. [2517266-1] XAP Appellant: Friends of the Earth, et al. Copies to all counsel. [97-1246, 97-1261] (db) [97-1246 97-1261]

8/6/97 Page-proof cross-appeal brief filed by Appellant Friends of the Earth in 97-1246, Appellant Citizens Local Envir in 97-1246, Appellant Sierra Club in 97-1246, Appellee Friends of the Earth in 97-1261, Appellee Citizens Local Envir in 97-1261, Appellee Sierra Club in 97-1261 Type of Service: PM Copies of brief: 4 # brf pages: 119. Sufficient[Y/N]? y. [97-1246, 97-1261]

Appellee(s) page-proof cross-appeal brief due 9/5/97 for Laidlaw Environ Ser in 97-1246, for Laidlaw Environ Ser in 97-1261. (rba) [97-1246 97-1261]

9/5/97 Page-proof cross-appeal brief filed by Appellee Laidlaw Environ Ser in 97-1246, Appellant Laidlaw Environ Ser in 97-1261. Type of Service: PM Copies of brief: 4 # brf pages: 102 Sufficient[Y/N]?: y. [97-1246, 97-1261] Appellant(s) page-proof cross-reply brief due 10/6/97 for Sierra Club in 97-1246, for Citizens Local Envir in 97-1246, for Friends of the Earth in 97-1246, for Sierra Club in 97-1261, for Citizens Local Envir in 97-1261, for Friends of the Earth in 97-1261 . (rba) [97-1246 97-1261]

9/12/97 Amicus curiae brief filed by Amicus Curiae SC Chamber of Comm in 97-1246, Amicus Curiae Environmental Mgmt in 97-1246, Amicus Curiae SC Mfrs Alliance in 97-1246, Potential Amicus Curiae SC Chamber of Comm in 97-1261, Potential Amicus Curiae Environmental Mgmt in 97-1261, Potential Amicus Curiae SC Mfrs Alliance in 97-1261. Type of Service: G-per clerk order dated 9/11/97 Copies of brief: 5 # am. br copies: 5 Sufficient [Y/N]?: Y. [97-1246, 97-1261] (llh) [97-1246 97-1261]

10/27/97 Page-proof cross-appeal reply brief filed by Appellant Friends of the Earth in 97-1246, Appellant Citizens Local Envir in 97-1246, Appellant Sierra Club in 97-1246, Appellee

Friends of the Earth in 97-1261, Appellee Citizens Local Envir in 97-1261, Appellee Sierra Club in 97-1261. Type of Service: PM Copies of brief: 4 # brf pages: 61 plus addendum. Sufficient[Y/N]?: y. n. [97-1246, 97-1261] Cross-appeal joint appendix due 11/10/97 for Citizens Local Envir in 97-1246, for Friends of the Earth in 97-1246, for Citizens Local Envir in 97-1261, for Friends of the Earth in 97-1261. (wtc) [97-1246 97-1261]

10/28/97 Response/answer requested to [2655604-1] motion to file amicus brief. Response/answer due 11/4/97 for Laidlaw Environ Ser in 97-1246, for Laidlaw Environ Ser in 97-1261. in 97-1246, [2655604-1] [97-1246, 97-1261] (db) [97-1246 97-1261]

11/4/97 Response/answer filed by Appellee Laidlaw Environ Ser in 97-1246, Appellant Laidlaw Environ Ser in 97-1261 to motion to file amicus brief [2655604-1] in 97-1246, 97-1261. [2660031-1]. [97-1246, 97-1261] (db) [97-1246 97-1261]

11/5/97 Amicus curiae brief filed by Amicus Curiae CA Public Interest in 97-1246, Amicus Curiae FL Public Interest in 97-1246, Amicus Curiae IL Public Interest in 97-1246, Amicus Curiae MA Public Interest in 97-1246, Amicus Curiae Public Interest MI in 97-1246, Amicus Curiae Public Interest NJ in 97-1246, Amicus Curiae OH Public Interest in 97-1246, Amicus Curiae OR State Public Int in 97-1246, Amicus Curiae

WA Public Interest in 97-1246, Amicus Curiae CA Public Interest in 97-1261, Amicus Curiae FL Public Interest in 97-1261, Amicus Curiae IL Public Interest in 97-1261, Amicus Curiae MA Public Interest in 97-1261, Amicus Curiae Public Interest MI in 97-1261, Amicus Curiae Public Interest NJ in 97-1261, Amicus Curiae OH Public Interest in 97-1261, Amicus Curiae OR State Public Int in 97-1261, Amicus Curiae WA Public Interest in 97-1261. Type of Service: G order dated 11/5/97 # am. br copies: 8

11/10/97 Amicus curiae brief filed by Amicus Curiae DHEC in 97-1246, Amicus Curiae DHEC in 97-1261. Type of Service: G order dated 11/10/97 # am. br copies: 8, pages: 19 Sufficient [Y/N]?: 1y. [97-1246, 97-1261] (rba) [97-1246 97-1261]

11/10/97 Amicus curiae brief filed by Amicus Curiae US in 97-1246, Amicus Curiae US in 97-1261 . Type of Service: G order dated 11/10/97 # am. br copies: 8 pages: 47, Sufficient [Y/N]?: 47y. [97-1246, 97-1261] (rba) [97-1246 97-1261]

11/10/97 Rule 30(c) cross joint appendix filed by Appellant Friends of the Earth in 97-1246, Appellant Citizens Local Envir in 97-1246, Appellant Sierra Club in 97-1246, Appellee Laidlaw Environ Ser in 97-1246, Appellee Friends of the Earth in 97-1261, Appellee Citizens Local Envir in 97-1261, Appellee Sierra Club in 97-1261, Appellant Laidlaw

Environ Ser in 97-1261. Type of Service: PM Copies of apx: 6 #pages: 728 Sufficient [Y/N]: y. [97-1246, 97-1261] Rule 30c Appellant(s) cross-brief due 11/20/97 for Sierra Club in 97-1246, for Citizens Local Envir in 97-1246, for Friends of the Earth in 97-1246, for Sierra Club in 97-1261, for Citizens Local Envir in 97-1261, for Friends of the Earth in 97-1261. Rule 30c appellee(s) cross-brief due 11/20/97 for Laidlaw Environ Ser in 97-1246, for Laidlaw Environ Ser in 97-1261. Rule 30c appellant(s) cross/reply brief due 11/20/97 for Sierra Club in 97-1246, for Citizens Local Envir in 97-1246, for Friends of the Earth in 97-1246, for Sierra Club in 97-1261, for Citizens Local Envir in 97-1261, for Friends of the Earth in 97-1261. (rba) [97-1246 97-1261]

11/12/97 Response/answer filed by Appellant Friends of the Earth in 97-1246, Appellant Citizens Local Envir in 97-1246, Appellant Sierra Club in 97-1246, Appellee Friends of the Earth in 97-1261, Appellee Citizens Local Envir in 97-1261, Appellee Sierra Club in 97-1261 to motion to file amicus brief [2663546-1] in 97-1261, 97-1261. [2664221-1]. [97-1246, 97-1261] (db) [97-1246 97-1261]

11/13/97 Brief filed by Amicus Curiae CA Public Interest in 97-1246, Amicus Curiae FL Public Interest in 97-1246, Amicus Curiae IL Public Interest in 97-1246, Amicus Curiae MA Public Interest in 97-1246, Amicus Curiae Public Interest MI in 97-1246, Amicus Curiae Public

Interest NJ in 97-1246, Amicus Curiae OH Public Interest in 97-1246, Amicus Curiae OR State Public Int in 97-1246, Amicus Curiae WA Public Interest in 97-1246, Amicus Curiae CA Public Interest in 97-1261, Amicus Curiae FL Public Interest in 97-1261, Amicus Curiae IL Public Interest in 97-1261, Amicus Curiae MA Public Interest in 97-1261, Amicus Curiae Public Interest MI in 97-1261, Amicus Curiae Public Interest NJ in 97-1261, Amicus Curiae OH Public Interest in 97-1261, Amicus Curiae OR State Public Int in 97-1261, Amicus Curiae WA Public Interest in 97-1261 returned for non-compliance with Rule: Order dated 11/5/97. [97-1246, 97-1261] Sufficient brief due on 11/17/97 for WA Public Interest in 97-1246, for OR State Public Int in 97-1246, for OH Public Interest in 97-1246, for Public Interest NJ in 97-1246, for Public Interest MI in 97-1246, for MA Public Interest in 97-1246, for IL Public Interest in 97-1246, for FL Public Interest in 97-1246, for CA Public Interest in 97-1246, for WA Public Interest in 97-1261, for OR State Public Int in 97-1261, for OH Public Interest in 97-1261, for Public Interest NJ in 97-1261, for Public Interest MI in 97-1261, for MA Public Interest in 97-1261, for IL Public Interest in 97-1261, for FL Public Interest in 97-1261, for CA Public Interest in 97-1261 (rba) [97-1246 97-1261]

11/17/97 Amicus brief made sufficient by Amicus Curiae CA Public Interest in 97-1246, Amicus Curiae FL Public Interest in 97-1246, Amicus Curiae IL Public Interest in 97-1246, Amicus Curiae

MA Public Interest in 97-1246, Amicus Curiae
Public Interest MI in 97-1246, Amicus Curiae
Public Interest NJ in 97-1246, Amicus Curiae
OH Public Interest in 97-1246, Amicus Curiae
OR State Public Int in 97-1246, Amicus Curiae
WA Public Interest in 97-1246, Amicus Curiae
CA Public Interest in 97-1261, Amicus Curiae
FL Public Interest in 97-1261, Amicus Curiae
IL Public Interest in 97-1261, Amicus Curiae
MA Public Interest in 97-1261, Amicus Curiae
Public Interest MI in 97-1261, Amicus Curiae
Public Interest NJ in 97-1261, Amicus Curiae
OH Public Interest in 97-1261, Amicus Curiae
OR State Public Int in 97-1261, Amicus Curiae
WA Public Interest in 97-1261[97-1246, 97-1261] (rba) [97-1246 97-1261]

11/20/97 Rule 30c cross-brief filed by Appellant Friends of the Earth in 97-1246, Appellant Citizens Local Envir in 97-1246, Appellant Sierra Club in 97-1246, Appellee Friends of the Earth in 97-1261, Appellee Citizens Local Envir in 97-1261, Appellee Sierra Club in 97-1261. Type of Service: PM Copies of brief: 8 # pages: 104 Sufficient? [Y/N]: y (wtc) [97-1246 97-1261]

11/20/97 Rule 30c appellant(s) cross-reply brief filed by Appellant Friends of the Earth in 97-1246, Appellant Citizens Local Envir in 97-1246, Appellant Sierra Club in 97-1246, Appellee Friends of the Earth in 97-1261, Appellee Citizens Local Envir in 97-1261, Appellee Sierra Club in 97-1261 Type of Service: PM

Copies: 8 # pages: 79. Sufficient [Y/N]: y. [97-1246, 97-1261] (wtc) [97-1246 97-1261]

11/21/97 Rule 30c cross-brief filed by Appellee Laidlaw Environ Ser in 97-1246, Appellant Laidlaw Environ Ser in 97-1261. Type of Service: PM Copies of brief: 8 # pages: 101 Sufficient [Y/N]: y (rba) [97-1246 97-1261]

11/21/97 Rule 30c appellee(s) cross-reply brief filed by Appellee Laidlaw Environ Ser in 97-1246, Appellant Laidlaw Environ Ser in 97-1261 Type of Service: PM Copies: 8 # pages: 28. Sufficient [Y/N]: y. . [97-1246, 97-1261] (rba) [97-1246 97-1261]

11/26/97 Supplemental brief filed by Appellant Friends of the Earth in 97-1246, Appellant Citizens Local Envir in 97-1246, Appellant Sierra Club in 97-1246. Type of Service: PM Copies of brief: 8 # brf pages: 16 . [97-1246, 97-1261] (rba) [97-1246 97-1261]

12/18/97 Supplemental authorities (FRAP 28(j)) filed by Appellant Friends of the Earth in 97-1246, Appellant Citizens Local Envir in 97-1246, Appellant Sierra Club in 97-1246 [2686446-1]. [97-1246, 97-1261] (llh) [97-1246 97-1261]

1/13/98 Supplemental authorities (FRAP 28(j)) filed by Appellant Friends of the Earth in 97-1246, Appellant Citizens Local Envir in 97-1246, Appellant Sierra Club in 97-1246, Appellant Laidlaw Environ Ser in 97-1261 [2699359-1].

[97-1246, 97-1261] (rba) [97-1246 97-1261]

3/5/98 Oral argument heard. Donald Alan Cockrill for Appellee Laidlaw Environ Ser in 97-1246, Bruce J. Terris for Appellant Sierra Club, Appellant Citizens Local Envir, Appellant Friends of the Earth in 97-1246, Donald Alan Cockrill for Appellant Laidlaw Environ Ser in 97-1261, Bruce J. Terris for Appellee Sierra Club, Appellee Citizens Local Envir, Appellee Friends of the Earth in 97-1261 Courtroom Deputy: JPH. [97-1246, 97-1261] (jph) [97-1246 97-1261]

3/13/98 Motion filed by Appellant Friends of the Earth in 97-1246, Appellant Citizens Local Envir in 97-1246, Appellant Sierra Club in 97-1246, Appellee Friends of the Earth in 97-1261, Appellee Citizens Local Envir in 97-1261, Appellee Sierra Club in 97-1261 to file supplemental briefs [2733521-1]. Supplemental brief tendered? (Y/N): n. [97-1246, 97-1261] (dhb) [97-1246 97-1261]

3/13/98 Response/answer requested to [2733521-1] motion to file supplemental briefs. Response/answer due 3/20/98 for Laidlaw Environ Ser in 97-1246, for Laidlaw Environ Ser in 97-1261, [2733521-1] motion to file supplemental briefs in 97-1261 [97-1246, 97-1261] (dhb) [97-1246 97-1261]

3/24/98 Record (partial record as requested by Court) on appeal filed. Pleadings: Vol. 1 SEALED:

Vol. 2 (pldg.). [97-1246, 97-1261] (db) [97-1246 97-1261]

3/24/98 Response/answer filed by Appellee Laidlaw Environ Ser in 97-1246, Appellant Laidlaw Environ Ser in 97-1261 to motion to file supplemental briefs [2733521-1] in 97-1261, 97-1261. [2739837-1]. [97-1246, 97-1261] (llh) [97-1246 97-1261]

4/7/98 COURT ORDER filed granting motion to file supplemental briefs [2733521-1] Appellant supplemental brief due 4/22/98 for Sierra Club in 97-1246, for Citizens Local Envir in 97-1246, for Friends of the Earth in 97-1246, appellee's response due 15 days from receipt of appellants' brief. Appellee supplemental brief due. in 97-1246, 97-1261 Copies to all counsel. [97-1246, 97-1261] (rba) [97-1246 97-1261]

4/16/98 Supplemental authorities (FRAP 28(j)) filed by Appellee Laidlaw Environ Ser in 97-1246, Appellee Friends of the Earth in 97-1261, Appellee Citizens Local Envir in 97-1261, Appellee Sierra Club in 97-1261 [2754990-1]. [97-1246, 97-1261] (rba) [97-1246 97-1261]

4/24/98 Supplemental brief filed by Appellant Friends of the Earth in 97-1246, Appellant Citizens Local Envir in 97-1246, Appellant Sierra Club in 97-1246. Type of Service: PM Copies of brief: 8 # brf pages: 20. [97-1246, 97-1261] (rba) [97-1246 97-1261]

5/6/98	Second supplemental brief filed by Appellee Laidlaw Environ Ser in 97-1246. Type of Service: CD Copies of brief: 8 # brf pages: 15. SEALED?[Y/N]: n. [97-1246, 97-1261] (rba) [97-1246 97-1261]
7/6/98	Supplemental authorities (FRAP 28(j)) filed by Appellant Friends of the Earth in 97-1246, Appellant Citizens Local Envir in 97-1246, Appellant Sierra Club in 97-1246 [2800196-1]. [97-1246, 97-1261] (rba) [97-1246 97-1261]
7/9/98	COURT ORDER filed granting motion to file amicus supplemental brief for US out of time [2784444-1] in 97-1246, 97-1261 Copies to all counsel. [97-1246, 97-1261] (rba) [97-1246 97-1261]
7/9/98	Amicus curiae brief filed by Amicus Curiae US in 97-1246, Amicus Curiae US in 97-1261. Type of Service: G order dated 7/9/98 # am. br copies: 8 Sufficient[Y/N]?: y. [97-1246, 97-1261] (rba) [97-1246 97-1261]
7/16/98	Published, authored opinion filed. [97-1246, 97-1261] (db) [97-1246 97-1261]
7/16/98	Judgment order filed. Decision: vacated and remanded. [97-1246, 97-1261] (db) [97-1246 97-1261]
8/7/98	Mandate issued. [97-1246, 97-1261] (db) [97-1246 97-1261]
11/23/98	Supreme Court notice that petition for certiorari

	was filed on 11/09/98. Spct No. : 98-822 Spct Pty 1: Friends of the Earth, et al Spct Pty 2: Laidlaw Environmental Svcs. [97-1246] (cw) [97-1246]
2/25/99	Federal Reporter Citation: 149 F. 3d 303. [97-1246, 97-1261] (cpg) [97-1246 97-1261]
3/3/99	Supreme Court order received granting petition certiorari [2887195-1] on 03/01/99 . [97-1246] (cw) [97-1246]